S. HRG. 101-707, PT. 2

TOBACCO PRODUCT EDUCATION AND HEALTH PROTECTION ACT OF 1990

HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1883

TO AMEND THE PUBLIC HEALTH SERVICE ACT TO ESTABLISH A CENTER FOR TOBACCO PRODUCTS, TO INFORM THE PUBLIC CONCERNING THE HAZARDS OF TOBACCO USE, TO DISCLOSE AND RESTRICT ADDICTIVES TO SUCH PRODUCTS, AND TO REQUIRE LABELING OF SUCH PRODUCTS TO PROVIDE INFORMATION CONCERNING SUCH PRODUCTS TO THE PUBLIC, AND FOR OTHER PURPOSES

APRIL 3, 1990

Part 2

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TOBACCO PRODUCT EDUCATION AND HEALTH PROTECTION ACT OF 1990

TUESDAY, APRIL 3, 1990

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:37 p.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy and Simon.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. The committee will come to order.

This is the committee's second hearing on S. 1883, the Tobacco Education and Health Protection Act of 1990. At our first hearing, we focused attention on the advertising practices of the tobacco industry. We saw that 25 years after the adoption of the industry's voluntary advertising code, which was implemented in an effort to forestall regulation of advertising, cigarettes remain one of the most heavily advertised and promoted products in the Nation, leading to the recruitment of thousands of young smokers every day.

Recent U.S. Supreme Court decisions have clarified the Constitutional issues, and given broad leeway to the States and the Federal Government under the First Amendment to restrict advertising in order to protect the health, welfare and safety of its citizens.

But present Federal law gives the States virtually no leeway because it preempts State laws with respect to cigarette advertising. In my view, it is time to repeal the Federal preemption law and give States the power to protect the public health of their citizens.

Each day in delay, the problem becomes more serious. Cigarette companies, desperate to recruit new smokers to offset falling profits, are resorting to more and more brazen tactics.

The campaign to promote the new "Dakota" cigarette has already begun in the City of Houston and has brought angry reactions from the local medical community and others. A physician group which tried to counter-advertise in the Houston press was denied advertising space in the two main newspapers.

In the city of Anchorage, an Alaska legislator sought to end the distribution of free samples of tobacco products in his State. Free samples of smokeless tobacco have been given to very young school children in some cases. The cigarette industry quickly flew representatives to Anchorage to oppose the ban on the ground that it

was not legal under the Federal preemption of advertising regulation.

The cigarette industry wants to restriction on the reckless distribution of free samples through the mail where there is no consideration of the age of the recipients. They want no restrictions on the placement or location of cigarette advertising so the industry can remain free to saturate poor and minority neighborhoods with misleading appeals designed to attract new smokers.

Two States and 16 cities have bans on free samples—and the industry has not challenged them in court. Several States and cities have restrictions on the placement of tobacco ads, and the industry has not challenged these restrictions—and for good reason. The advertising practices are indefensible, and the industry would almost certainly lose in court.

Last week, the Department of Health and Human Services released its annual publication, *Health United States 1989*, showing that despite continued declines in the rates of heart disease and stroke, the rate of lung cancer continues to rise, especially among women. It affects both white and black women. The rate for both is rising at over 5 percent a year.

The goal of S. 1883 is to expand Federal efforts to educate the public about the harmful effects of smoking and to give States greater power and incentives to act in ways that protect the public.

Today, in addition to discussing restrictions on advertising, we will hear about a city in Illinois which has brought the sale of cigarettes to minor under effective control. The vast majority of States have laws which restrict sales to minors, but few States enforce these laws. The legislation before us will encourage demonstration programs in States willing to make their laws work.

Finally, we will also hear more about the issue of additives in cigarettes. For 6 years, the Department of Health and Human Services received an annual list of additives that contains too little information to be of value. The attitude seems to be, cigarettes will kill you anyway, so why worry about cancer-causing additives. S. 1883 will change all that by requiring manufacturers to discuss the truth about additives in cigarettes.

We welcome our witnesses and look forward to their testimony today and to early Senate action on this legislation.

As our first panel, we have two members of Congress who were good enough to come over and join us here this afternoon. Tom Luken chairs the Subcommittee on Transportation, Tourism and Hazardous Materials of the Energy and Commerce Committee. He has held numerous hearings on advertising of tobacco. And Representative Stephen Neal, whose district in Central North Carolina includes 8,000 R.J. Reynolds employees in Winston-Salem and over 1,000 American Tobacco Company employees in Reedsville, as well as thousands of tobacco farmers.

We welcome the chance to have both of you here, and we will proceed by seniority.

Mr. Luken.

STATEMENTS OF HON. THOMAS A. LUKEN, A MEMBER OF CONGRESS FROM THE STATE OF OHIO; AND HON. STEPHEN L. NEAL, A MEMBER OF CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. LUKEN. Thank you, Mr. Chairman.

I certainly commend you for introducing this legislation and holding these hearings. I request my statement be made part of the record.

Your bill, the Tobacco Education and Control Act of 1990, seeks greater education about the risks of smoking, more effective regulation of tobacco products, and more truth in advertising about the risks of smoking. Your bill has the same goal as the bill I introduced last year, the Protection of Our Children from Cigarettes Act of 1989. Our common goal is to create a smoke-free country.

The details of the two bills differ, of course, in part because our respective committees have different jurisdictions. H.R. 1250 concentrates on regulating tobacco advertising. This emphasis is due to the vast amounts spent advertising and promoting cigarettes in this country.

My subcommittee, which has jurisdiction over the FTC, has just obtained from the commission the cigarette advertising data that it has collected for 1988. These data, which have not yet been made public by the commission, show that in 1988 the tobacco companies in this country spent a staggering $3.25 billion in advertising and promoting cigarettes. This is a 26 percent increase in 1 year over the $2.58 billion spent in 1987. I am disturbed about the vast amount of money spent by these merchants of addiction and by its rapid growth.

One portion of our bill prohibits all cigarette advertising and promotion that can be seen or heard by a person under the age of 18, but it permits text-only cigarette ads, or "tombstone ads". A *Wall Street Journal* story last Friday, which is attached to my testimony, summarizes the current international situation on cigarette advertising. Canada, most of Scandinavia, Italy, Portugal, Singapore, Kuwait and Thailand have banned cigarette advertising. Australia, New Zealand and the European Economic Community are proposing severe restrictions on advertising.

Another portion of our bill makes it clear that State and local governments can in fact use their traditional police powers to regulate the advertising and promotion of tobacco products. This provision is similar, of course, to Section 955 of S. 1883, and I want today to discuss the important role State and local governments should be allowed to play—must play—in combating the deceptive advertising of cigarettes.

Prior to the passage of the Federal Cigarette Labelling and Advertising Act, it was undisputed that State and local governments had the same power to regulate the advertising and promotion of cigarettes as for any other product. For example, in 1932, the U.S. Supreme Court unanimously held that a Utah criminal statute banning cigarette billboards did not violate either the Fourteenth Amendment or the Commerce Clause of the Constitution. Indeed, in the Comprehensive Smokeless Tobacco Health Education Act of

1986 which Congress passed, it was made clear that it was not completely preempting the State authority over smokeless tobacco.

Nevertheless, the tobacco industry argues that Congress preempted the ability of the State and local governments to regulate the advertising and promotion of cigarettes when it enacted the Federal Cigarette Labelling Act.

Today I would like to share with you some of the principal findings which we have developed in the last 3 years in nine hearings. Each of these hearings dealt with a different aspect of tobacco advertising, and many of our findings are directly relevant to this preemption controversy.

Surgeon General Koop told our subcommittee last September that tobacco is addictive in a way similar to cocaine and heroin, that 20 percent of our high school seniors are daily smokers, that smoking causes 390,000 premature deaths in this country each year. By comparison, cocaine and heroin only kill about 6,000 Americans—only. Not surprisingly, the tobacco industry says that the Surgeon General is wrong.

There were 14 witnesses in addition to The Tobacco Institute who testified at our July 1989 hearing in opposition to our bill. As shown in the table attached to the statement, Mr. Chairman, every one of these 14 witnesses, including some who are testifying today—with the notable exception of my colleague on my left—have financial ties with the tobacco industry. Some, such as the various advertising groups, share in the vast sums the tobacco industry spends advertising and promoting cigarettes. Others which we might not suspect, such as the American Civil Liberties Union and the Washington Legal Foundation, have received grants from the tobacco companies. They won't tell us how much. The conflict of interest of these witnesses is clearly relevant in deciding how much weight we in Congress and the public should give to these views.

I believe the Surgeon General's medical findings are highly relevant for a decision on whether to further restrict cigarette advertising. However, the claque of the merchants of addiction told our subcommittee that the Surgeon General's medical findings are irrelevant as to whether legislation should be enacted.

For example, attached to my statement is my colloquy with the President of the American Advertising Federation, Mr. Bell, and the President of the Association of National Advertisers, Mr. Helm, at our July 1989 hearing. Both of these witnesses—whose organizations are part of the Freedom to Advertise Coalition that is testifying today—refused to say whether the Surgeon General is correct in his medical findings.

Professor Neuborne, who is testifying today, said, "I cannot comment on the correctness or incorrectness of the Surgeon General's medical findings."

The American Civil Liberties Union, which is also testifying today, told our July 1989 hearing that it "takes no position" on the Surgeon General's findings.

Our subcommittee has heard testimony that the purpose and effect of tobacco advertising is to get young people to smoke. At our July 1989 hearing, David Goerlitz, who was a "Winston man" who we all saw in cigarette ads for 6 years, explained how the advertis-

ing agency for R.J. Reynolds, which sells Winston cigarettes, tested which picture to use on cigarette billboards by showing different pictures to children in shopping centers. His testimony was collaborated by David McCall, the chairman emeritus of a large New York City advertising agency, who showed the subcommittee specific cigarette ads that he said were clearly aimed at young people.

Just last month at a hearing we held it was revealed that R.J. Reynolds has recently been mailing offers of free cigarettes to children who had earlier ordered Camel T-shirts in response to an advertisement in last year's *Sports Illustrated* swimsuit issue.

We are continuing our investigation of these direct mail offers and trying to get more information from the tobacco companies.

It is clear that many State and local governments want to use their traditional police powers to protect their citizens, and especially their children. The testimony at our hearings reveals that the tobacco companies have tried to thwart the State and local governments by arguing that section 5 of the Federal Cigarette Labeling and Advertising Act prevents such State and local actions.

At our hearing in June, Dr. Robert McAfee, a physician in Maine and a member of the Board of Trustees of the AMA, told us that in 1987 the Maine legislature wanted to prohibit cigarette companies from sponsoring sports events for children. According to Dr. McAfee, tobacco company lobbyists persuaded the Maine legislature that such State action was barred by the Federal statute, by the Federal Cigarette Labeling and Advertising Act, and his statement is attached to my statement today.

A similar thing happened in Minnesota. At our hearing last month, we raised the example of the Minnesota legislature's considering in 1987 a bill that would ban tobacco advertising on public property, require anyone who purchases outdoor tobacco advertising to pay for equivalent anti-smoking advertising, and ban all free samples of tobacco products.

A lawyer from Covington & Burling told the Minnesota legislature on behalf of The Tobacco Institute that the Federal Cigarette Labeling and Advertising Act preempted these provisions.

I do not agree with the tobacco industry's lawyers when they argue that in 1970 Congress preempted all State and local control of cigarette advertising. Ultimately, however, it is up to the courts to decide what Congress intended in 1970.

However, I think that we should now make it so clear in legislation such as you have proposed and that we have proposed that even the tobacco industry will understand that the Congress is not going to let the merchants of addiction wrap themselves in a law passed by Congress to protect our citizens from the scourge of tobacco. Congress should promptly enact legislation such as S. 1883 and H.R. 1250 that subjects cigarettes to the same State and local powers that apply to all other products.

The Federal and State courts will, of course, continue to ensure that any particular State or local restriction on cigarette advertising and promotion complies with the Constitution.

Mr. Chairman, this concludes my statement. I thank you for the opportunity to address you and would be glad to consider any further discussion or questions.

The CHAIRMAN. Fine. Your full statement and all the statements today will be included as part of the record.

I'd like to go to Mr. Neal and then I have a few questions for both of you.

[The prepared statement of Mr. Luken (with attachments) follows:]

Testimony of the Honorable Thomas A. Luken
Chairman
Subcommittee on Transportation and Hazardous Materials
Committee on Energy and Commerce
U. S. House of Representatives

before
The Committee on Labor and Human Resources
U. S. Senate
April 3, 1990

Thank you, Mr. Chairman, for inviting me to testify at today's hearing. I commend you for holding these hearings on your bill and for taking swift action to move this vital legislation through the Senate.

I request that my complete statement be made a part of the record of this hearing.

Your bill, the Tobacco Education and Control Act of 1990 (S. 1883), seeks greater education about the risks of smoking, more effective regulation of tobacco products, and more truth in advertising about the risks of smoking. Your bill has the same goal as the bill I introduced last year, the Protect Our Children from Cigarettes Act of 1989 (H.R. 1250). Our common goal is to create a smoke-free country.

The details of the two bills differ, of course, in part because our respective committees have different jurisdictions. H.R. 1250 concentrates on regulating tobacco advertising. This emphasis is due to the vast amounts spent advertising and promoting cigarettes in this country.

My Subcommittee, which has jurisdiction over the Federal Trade Commission, has just obtained from the Commission the cigarette advertising data that it has collected for 1988. These data, which have not yet been made public by the Commission, show that in 1988 the tobacco companies spent a staggering $3.25 billion advertising and promoting cigarettes in this country. This is a 26 percent increase over the $2.58 billion spent in 1987. I am disturbed both about the vast amount of money spent by the merchants of addiction and by its rapid growth.

One portion of H.R. 1250 prohibits all cigarette advertising and promotion that can be seen or heard by a person under the age of 18, but it permits text-only cigarette ads -- so-called "tombstone ads." A Wall Street Journal story last Friday, which is attached to my testimony, summarizes the current international situation on cigarette advertising. Canada, most of Scandinavia, Italy, Portugal, Singapore, Kuwait, and Thailand have banned

cigarette advertising. Australia, New Zealand, and the European Economic Community are proposing to severely restrict cigarette advertising.

Another portion of H.R. 1250 -- section 4(c) -- makes it clear that State and local governments can in fact use their traditional police powers to regulate the advertising and promotion of tobacco products. This provision is similar, of course, to section 955 of S. 1883, and I want today to discuss the important role State and local governments should be allowed to play in combatting the deceptive advertising of cigarettes.

Prior to the passage of the Federal Cigarette Labeling and Advertising Act, it was undisputed that State and local governments had the same power to regulate the advertising and promotion of cigarettes as for any other product. For example, in 1932 the Supreme Court unanimously held that a Utah criminal statute banning cigarette billboards did not violate either the Fourteenth Amendment or the Commerce Clause of the Constitution. Packer Corp. v. Utah, 285 U.S. 105 (1932). Indeed, in the Comprehensive Smokeless Tobacco Health Education Act of 1986 Congress made it clear that it was not completely preempting State authority over advertising of smokeless tobacco.

However, the tobacco industry argues that Congress preempted the ability of State and local governments to regulate the advertising and promotion of cigarettes when it enacted the Federal Cigarette Labeling and Advertising Act.

Today I would like to share with you some of the principal findings developed over the last three years in nine hearings held by the Subcommittee which I chair. Each of these hearings dealt with a different aspect of tobacco advertising, and many of our findings are directly relevant to this preemption controversy.

Surgeon General Koop told our Subcommittee last September that tobacco is addictive in a way similar to cocaine and heroin, that 20 percent of our high school seniors are daily smokers, and that smoking causes 390,000 premature deaths in this country each year. By comparison, cocaine and heroin only kill about 6,000 Americans each year. Not surprisingly, the tobacco industry says that the Surgeon General is wrong.

There were 14 witnesses, in addition to the Tobacco Institute, who testified at our July 1989 hearing in opposition to H.R. 1250. As shown in the table attached to this statement, every one of these fourteen witnesses -- including some who are testifying today -- has financial ties with the tobacco industry. Some, such as the various advertising groups, share in the vast sums the tobacco industry spends advertising and promoting cigarettes. Others, such as the American Civil Liberties Union and the Washington Legal Foundation, have received grants from the tobacco companies. The conflict of interest of these

witnesses is clearly relevant in deciding how much weight we in Congress and the public should give to their views.

I believe the Surgeon General's medical findings are highly relevant for a decision on whether to further restrict cigarette advertising. However, the claque of the merchants of addiction told our Subcommittee that the Surgeon General's medical findings are irrelevant as to whether legislation like H.R. 1250 should be enacted. For example, attached to my statement is my colloquy with the President of the American Advertising Federation, Mr. Bell, and the President of the Association of National Advertisers, Mr. Helm, at our July 1989 hearing. Both of these witnesses -- whose organizations are part of the Freedom to Advertise Coalition that is testifying today -- refused to say whether the Surgeon General is correct in his medical findings. Professor Neuborne, who is testifying today, said "I cannot comment on the correctness or incorrectness of the Surgeon General's findings." The American Civil Liberties Union, which is also testifying today, told our July 1989 hearing, in its prepared statement, that it "takes no position" on the Surgeon General's medical findings.

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It is clear that many State and local governments want to use their traditional police powers to protect their citizens -- and especially their children -- from the tobacco companies' deceptive advertising and promotions. The testimony at our hearings reveals that the tobacco companies have tried to thwart the State and local governments by arguing that section 5 of the Federal Cigarette Labeling and Advertising Act prevents such State and local actions.

At our hearing on June 8, 1988 Dr. Robert McAfee, a physician in Maine and a member of the Board of Trustees of the American Medical Association, told us that in 1987 the Maine legislature wanted to prohibit cigarette companies from sponsoring sports events for children. According to Dr. McAfee, tobacco company lobbyists persuaded the Maine legislature that

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This concludes my statement, and I would be happy to answer
r questions.

ADVERTISING / By Joanne Lipman

French Plan to Ban Tobacco Ads Cheers Advocates of Same in U.S.

Cheering the French government's proposal to ban all tobacco advertising, anti-smoking advocates in the U.S. say the growing list of foreign countries proposing or implementing ad bans will help their case here.

If the proposal is enacted, France would join Italy, Portugal, and most of the Scandinavian countries in banning tobacco ads from both television and the print media. Several countries outside Europe, including Singapore, Kuwait and Thailand, also have bans in effect.

And France is far from alone in proposing new measures. U.S. tobacco interests have been nervously glancing north ever since Canada passed a virtual tobacco ad ban last summer; the measure is going into effect now, although it is the subject of a court challenge. Australia and New Zealand both have proposed severe restrictions recently. Most ominous for the tobacco industry, the European Community is currently crafting restrictions, and a possible ban, that would apply to all 12 EC countries.

"All these things happening around the world are all feeding each other," says Scott Ballin of the American Heart Association, who also is a member of the Coalition on Smoking or Health, which advocates a total tobacco ad ban here in the U.S. The "around-the-world reactions," he says, are "creating an environment that tobacco advertising and promotional activities should be either curtailed or totally banned."

U.S. advertisers insist the foreign measures won't have any influence here, but many anti-tobacco groups believe otherwise. Already, the tobacco industry is facing a perhaps unprecedented onslaught on Capitol Hill, where [illegible] six proposed bills would severely restrict tobacco advertising. Among them are bills sponsored by congressmen Tom Luken (D., Ohio) and Mike Synar (D., Okla.) which would ban the use of colors or pictures in tobacco ads, basically permitting only all-text ads.

Both those bills, in addition to one proposed by Sen. Edward Kennedy (D., Mass.), would also allow state and local governments to come up with their own cigarette-advertising restrictions.

If any of the measures were to pass, the effect would be potentially devastating for the tobacco industry. In 1988, tobacco companies poured a staggering $3.25 billion into advertising, up 26% from $2.58 billion in 1987, according to the Federal Trade Commission. The 1988 spending figure hasn't yet been released, but was obtained by Mr. Luken.

"Any one of those bills would either severely damage or kill tobacco advertising," says Dan Jaffe of the Association of National Advertisers, a trade group. He says he expects the bills' supporters to try to bolster their arguments by "citing any action in any country they believe is supportive of these restrictions."

Advertising and tobacco groups in the U.S. contend, nevertheless, that the U.S. won't be affected by the growing number of restrictions abroad. U.S. advertising has the strong protection of the First Amendment, they point out. The U.S. also is more influenced by powerful lobbying groups like the cash-rich tobacco industry. Says Kim Koonta, an aide to Mr. Synar, "Special interests don't play a role [abroad] the way they do in the U.S. The tobacco industry contributes tens of thousands of dollars" to congressional campaigns. "You can't underestimate campaign financing."

Still, the U.S. tobacco industry will find it hard to ignore the growing foreign ad restrictions – especially those in Europe. The EC Commission, a panel set up to harmonize various European laws, has proposed banning all cigarette image advertising in all 12 of its member countries. Ads would be restricted solely to product packaging and information about tar and nicotine content. The EC Parliament, meanwhile, several weeks ago decided those rules weren't strict enough, and suggested banning cigarette advertising altogether in Europe.

Now, the EC Commission is back at work trying to draft a compromise bill – but even advertising groups concede the ultimate result will likely be severe tobacco ad restrictions, Europe-wide.

The irony of the situation isn't lost on the Europeans. The U.S. has always been a leader in trying to crack down on tobacco; it was the first country to ban cigarette TV ads for health reasons. Yet now, other countries seem to be leaving it behind.

"Normally, we look to the U.S. to see how the trends are going," says Angela Mills, director of special issues for the Advertising Association, a U.K. trade group. Now, she says, "It's the other way around." The growing restrictions in Europe and elsewhere, she adds, will be "fuel for the anti-advertising lobby [in the U.S.]. That's something that has to be taken seriously."

Liquor Health Warnings

Sen. Al Gore (D., Tenn.) and Rep. Joseph P. Kennedy (D., Mass.) are going to propose legislation that would require liquor companies to include health warnings in their advertisements.

The plan to introduce the measure will be announced next week, spokeswomen for the legislators said. They declined to offer any details of the proposal.

A spokeswoman noted, however, that Sen. Gore was active in recent legislation that now requires liquor companies to place health warnings on their products. He was also a leading advocate of stronger health warnings on cigarette packages and advertising now in place, she said.

FINANCIAL LINKS BETWEEN CONGRESSIONAL COMMITTEE WITNESSES OPPOSING H.R. 1250, THE PROTECT OUR CHILDREN FROM CIGARETTES ACT OF 1989, AND THE TOBACCO INDUSTRY

WITNESSES AT JULY 25, 1989 HEARING OF THE COMMITTEE ON ENERGY AND COMMERCE SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS.	FINANCIAL LINK WITH TOBACCO INDUSTRY
1. American Civil Liberties Union[1]	Grants from tobacco firms.*
2. American Newspaper Publishers Association[1]	1987 - $96 million in tobacco advertising.** 1988 - $106 million in tobacco advertising.**
3. Freedom to Advertise Coalition	
(a) American Advertising Federation	1987 - $2.6 billion in tobacco advertising and promotion.** 1988 - $3.2 billion " " " " " **
(b) American Association of Advertising Agencies	1987 - $2.6 billion in tobacco advertising and promotion.** 1988 - $3.2 billion " " " " "
(c) Association of National Advertisers	Tobacco companies are members.***
(d) Magazine Publishers of America	1987 - $318 million in tobacco advertising.** 1988 - $355 million " " " **
(e) Outdoor Advertising Association of America	1987 - $270 million in tobacco advertising.** 1988 - $319 million " " " **
(f) Point-Of-Purchase Advertising Institute	1987 - $154 million in tobacco advertising.** 1988 - $222 million " " " **
4. National Automatic Merchandising Association[1]	$1.6 billion in vending machine annual sales of cigarettes.***
5. National Hispanic Expositions, Inc[1]	Grants from tobacco companies.***
6. National Hot Rod Association[1]	Prize money and other financial support from tobacco companies.***
7. National Tobacco Council[1]	Tobacco farmers.***
8. Smokeless Tobacco Council[1]	Member are producers of smokeless tobacco.***
9. Tobacco Institute	Five tobacco companies are its members.***
10. Washington Legal Foundation	Grants from tobacco companies.****

1 Written statement only.

Sources:
- * Boston Globe, November 14, 1989.
- ** Federal Trade Commission 1987 Report to Congress (1989) and March 29, 1990 letter to Subcommittee staff in response to Freedom of Information Act request.
- *** Witness's Testimony.
- **** Letter of March 15, 1990 to Chairman Thomas A. Luken.

TOBACCO ISSUES (Part 1)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

INCLUDING

H.R. 1250

A BILL TO PROVIDE THAT THE PROMOTION AND CERTAIN ADVERTISING OF TOBACCO PRODUCTS TO CHILDREN AND THE SALE FROM VENDING MACHINES OF TOBACCO PRODUCTS TO CHILDREN VIOLATE THE FEDERAL TRADE COMMISSION ACT

JULY 25, 1989—PROTECTING OUR CHILDREN FROM CIGARETTES
SEPTEMBER 12, 1989—SURGEON GENERAL KOOP RESPONDS TO CRITICS

Serial No. 101-85

Printed for the use of the Committee on Energy and Commerce

of the findings that relate to the health issue per se because that is not the area of expertise of members of the advertising industry. We are not doctors and practitioners.

Mr. LUKEN. Sir, you have heard us discussing this here today, and you have heard me and other say that we base our conclusions that tobacco advertising and cigarette advertising is inherently deceptive because of these findings.

It does make a difference, does it not, whether or not you accept the findings or not, doesn't it? If you are going to say as the tobacco industry does, and I want to know if you are, then you don't know whether tobacco kills 390,000 people a year. That's what I want to know. Is that what you are saying, that you don't know whether it is because you are not an expert?

Mr. BELL. No, Mr. Chairman. We are saying that the relationship between the product and the advertising is different. We are not addressing the issue of the product.

Mr. LUKEN. That's another question. I am asking you whether you accept the findings or whether you find fault with the finding that tobacco kills 390,000 people?

Mr. BELL. We have no fault with that. We don't comment on that.

Mr. LUKEN. I am not asking you whether you have any fault with it. I am asking you whether you accept it or not?

Mr. BELL. We have commented on it.

Mr. LUKEN. Do you accept it or not?

Mr. BELL. I accept the facts.

Mr. LUKEN. Or, are you like the tobacco industry, you don't know whether it is true or not?

Mr. BELL. We accept anything that is factual in terms of the record.

Mr. LUKEN. Do you accept that as factual?

Mr. BELL. What we don't accept is the connection between that.

Mr. LUKEN. Do you accept that as factual or not, Mr. Bell?

Mr. BELL. Basically, probably, yes, but we don't make the connection between that and advertising being the cause.

Mr. LUKEN. Do you accept it, Mr. Helm?

Mr. HELM. What we don't accept is that there is a causal relationship here. Let's for a minute accept the findings.

Mr. LUKEN. What do you mean, causal relationship?

Mr. HELM. I will accept the findings for the purposes to illustrate my point.

Mr. LUKEN. Sir, I don't know what you mean, to illustrate your point. We are not talking about hypothetically, we are asking you if you want to answer. The tobacco industry won't answer. I am asking you whether you will answer whether or not you accept that these findings are true?

Mr. HELM. You are forcing me to give you the answer you want to make a point you want to make.

Mr. LUKEN. I am not forcing you. I am asking you whether you will?

Mr. HELM. No, I will not accept them. That is not my area of expertise.

Mr. LUKEN. Then, you are like the tobacco industry. You will not accept the findings of the Attorney General.

Mr. HELM. That is not my area of expertise.

Mr. LUKEN. Well, the Attorney General, Griffin Bell came in here. He's a former Attorney General. He was asked whether he accepted it and he said I will accept it because the government says so.

Mr. HELM. I will accept what the Surgeon General says.

Mr. LUKEN. That's what he says.

Mr. HELM. No, the Surgeon General said that there is no credible evidence that advertising has anything to do with inducing children to smoke.

Mr. LUKEN. That's another question. We will get to that in a minute. The factual findings is the question. We have set them out, these findings, tobacco causes the unnecessary deaths of 390,000 Americans annually. That is one. The major cause of cancer of the lung and esophagus, larynx, contributory factor in cancer of the urinary bladder, kidney and pancreas, responsible for 85 to 90 percent of the approximately 120,000 annual lung cancer deaths plus scores of thousands of others and so on.

Cigarette smoking and the use of smokeless tobacco are addictive. Yes, these are all taken from the Surgeon General's findings. I won't pursue it any further, but the tobacco industry has consistently come in here and said that we don't accept those findings. They may be true and they may not be true. Many of the members here, and I am approaching it on the basis that they are true and that, because of the fact that they are true, tobacco becomes a unique product.

The constitutionality question, in my opinion, hinges upon whether you accept that finding that it kills 390,000 persons; that 20 percent of high school seniors smoke on a daily basis; that smoking is addictive. It makes a difference in approaching the constitutionality because none of you challenge the fact that the government has a right to say that advertising which is false or deceptive can be prohibited.

Therefore, for those of us who take this position that any advertising, which isn't necessarily favorable, is inherently deceptive of a product which is unique which is tobacco, which is guilty of all these sins. You either accept that tobacco is guilty as charged of killing 390,000 people or you don't.

If you do, then it seems to me that you can still make your hypothetical argument, your legal argument, but it is pretty well undermined by the fact that tobacco is a unique product which kills all these people and is addictive, and isn't entitled to that protection because anything that is said favorably about it is inherently deceptive.

Mr. NEUBORNE. With respect, Mr. Chairman, I cannot comment on the correctness or incorrectness of the Surgeon General's findings. As I recall when Griffin Bell was here, he said if the government says it he is willing to accept it, although he personally couldn't verify it and neither can I.

I don't have that kind of expertise, and therefore I can't represent to you that I believe it is true. I do accept if the Surgeon General——

Mr. LUKEN. He accepted it if my government says so, he did say

[redacted] ADVERTISING, TESTING AND LIABILITY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION, TOURISM, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

INCLUDING

H.R. 4543

A BILL TO AMEND THE FEDERAL TRADE COMMISSION ACT TO AUTHORIZE A CONTINUING STUDY OF TOBACCO SMOKE, AND FOR OTHER PURPOSES

MAY 4, JUNE 8 AND 29, 1988

Serial No. 100–217

Printed for the use of the Committee on Energy and Commerce

Mr. LUKEN. Thank you, Mr. Stellman. We're being called to the full committee, but I'm wondering if we couldn't perhaps complete this panel.

I think I can get by on about 3 or 4 minutes. Dr. McAfee, you mentioned Maine. What's happening exactly in Maine?

Mr. MCAFEE. The problem we had, sir, was a bill before our State legislature that would ask for the elimination of cigarettes in the endorsement and promotion of sporting events.

We were particularly concerned that several of these sporting events were held for use of the State of Maine.

Mr. LUKEN. Right.

Mr. MCAFEE. It is illegal in Maine to purchase cigarettes age 18 and under.

Mr. LUKEN. Yes.

Mr. MCAFEE. We now find that we have sporting events in which age groups of those 18 and under are being sponsored and promoted by that.

The bill before the subcommittee was favorably enacted, but once the information that was then distributed by the representatives in the Tobacco Institute and the industry itself, there are lobbyists stating that the Federal preemption would prevent our State from doing that.

Mr. LUKEN. The Federal preemption that we're talking about here, repealing here.

Mr. MCAFEE. That's exactly true.

Mr. LUKEN. In other words, the regulatory scheme that the tobacco advocates, those representing tobacco, and they were telling us that this statute that we want to repeal sets up a regulatory scheme, a Federal standard.

In Maine, it has been used to prevent the State of Maine from adopting this legislation on sporting events, sponsorship of sporting events.

Mr. MCAFEE. That's correct.

Mr. LUKEN. This ties in with what Mr. Slattery pointed out that under this statute unwittingly Congress has prevented States from being able to pass laws with regard to placement of billboards, with regard to almost anything else.

So that with regard to tobacco, tobacco is absolved. Tobacco is exempt. Tobacco is immune, by reason of this statute, to what other products are susceptible to. Isn't that right?

Mr. MCAFEE. That's correct.

Mr. LUKEN. It has a privileged position. Anybody have any other comment on that? All right. I said I'd only take a couple minutes

Truthful, deceptive, again, tobacco advocates are telling us we can't restrict advertising of that which is truthful and legal.

All right. Tobacco is legal. But is all the advertising truthful? Mr. Ballin? It is claimed to be deceptive. Is it not?

Mr. BALLIN. Mr. Chairman?

Mr. LUKEN. When two tobacco companies advertise lowest tar, one of them has got to be deceptive if both of them claim to be lowest?

Mr. BALLIN. Yeah. At the last hearing we pointed out that we had a concern about all low tar advertising, particularly the Carlton and the Now ads——

JOHN J. MARTY
Senator 63rd District

Senate
State of Minnesota

February 14, 1989

Benjamin Cohen
Senior Counsel
Room 324 House Office Annex No. 2
U. S. House of Representatives
Washington, DC 20515

Dear Mr. Cohen:

I was told that you were at a recent conference on tobacco legislation in Houston and expressed interest in seeing evidence that the tobacco industry uses the federal preemption from the federal Cigarette Labeling and Advertising Act to discourage states from addressing cigarette related issues.

In Minnesota, we have found that whenever an issue related to cigarette advertising is raised at the Legislature, the tobacco industry comes in arguing that the federal preemption prevents states from doing anything in this regard.

I'm enclosing a memo from David Remes, a Washington lawyer representing the Tobacco Institute, in opposition to one of my bills a couple years ago. As you can see, he makes his main points in opposition beginning on page 3 where he addresses the federal preemption.

We have refined our proposals significantly since that time and have already passed a bill banning free distribution of cigarettes.

This session I hope to be able to pass legislation prohibiting tobacco advertising on billboards, not because of health concerns, but because it is illegal for minors to use tobacco products and billboards have a major impact on encouraging young people to break the law. The purpose section of our new legislation draws heavily on the arguments used by the U. S. Supreme Court in the 1932 Packer case which upheld a similar Utah billboard ban.

While I'm confident that we have drafted legislation likely to be upheld in the courts, I can guarantee that the tobacco industry will be in here screaming federal preemption.

I hope this information is helpful to you. Please let me know if I can be of further assistance.

Sincerely,

John J. Marty

COVINGTON & BURLING

STATEMENT OF DAVID H. REMES
COVINGTON & BURLING
WASHINGTON, D.C.

April 8, 1987

HEARING ON S.F. 962 BEFORE THE
MINNESOTA SENATE COMMITTEE ON HEALTH & HUMAN SERVICES

Good afternoon. My name is David H. Remes. I am a lawyer with Covington & Burling in Washington, D.C. I am here today to address the legal issues raised by three provisions of S.F. 962 that concern tobacco-product advertising. I represent the Tobacco Institute, but the issues raised by these provisions of S.F. 962 go far beyond the particular concerns of the tobacco industry.

The first provision -- new Subdivision 1 of Section 1 of Minnesota Statutes 1986, Section 144.395 -- would ban tobacco-product advertising on any property owned or leased by the State or its political subdivisions.

The second provision -- new Subdivision 2 of Section 1 of Minnesota Statutes 1986, Section 144.395 -- would require anyone who purchases outdoor advertising space or service for tobacco-product advertising to purchase an equivalent amount of advertising space or service to be used for anti-smoking messages.

The third provision -- amending Subdivision 2 of Section 4 of Minnesota Statutes 1986, Section 325F.77 -- would make the existing prohibition against distribution of tobacco-

product samples to minors an absolute prohibition against all tobacco-product sampling in the state.

These proposals reflect a view currently held by some that the way to address the health problems associated with tobacco-product consumption is to ban, restrict, or inhibit tobacco-product advertising.

In the past year-and-a-half, various measures to ban or restrict tobacco-product advertising have been proposed in Congress. These proposals have provoked an extraordinary First Amendment outcry from across the political spectrum.

They are opposed by the U.S. Department of Justice and the American Civil Liberties Union, which rarely agree on anything. They also are opposed by the Chairman of the Federal Trade Commission, who believes that restricting tobacco-product advertising in order to curb tobacco-product consumption "would do consumers more harm than good."

Finally, these proposals have been sharply condemned on First Amendment grounds by the most eminent constitutional scholars in the country -- Professor Philip B. Kurland of the University of Chicago Law School, Professor Charles Alan Wright of the University of Texas Law School, Professor William Van Alstyne of Duke University Law School, and Professor Alan Dershowitz of Harvard Law School, among others.

This past February, the American Bar Association rejected a proposal that it go on record in favor of a federal tobacco-product advertising ban. It did so, according to ABA

President Eugene Thomas, "because we believe in the free-speech principle."

Congress, of course, is limited in its actions only by the United States Constitution. For that reason, the First Amendment has been the focus of the debate over proposed federal tobacco-product advertising restrictions.

State and local political bodies, however, are subject to an additional constraint. A federal law prohibits any state or local regulation of cigarette advertising based on smoking and health. Such state or local action is "preempted" by the federal statute.

That statute is the Federal Cigarette Labeling and Advertising Act. It contains an express "preemption" provi-

ch provides:

> "(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. 1334.

As the United States Court of Appeals for the Third Circuit stated in a decision last spring, the Federal Cigarette Labeling and Advertising Act represents "a carefully drawn balance" between providing the public with information about smoking and health "and protecting the interests of [the] national economy." Congress believed that "this balance

would be upset by either a requirement of a warning other than that prescribed in section 1333 or a requirement or prohibition based on smoking and health 'with respect to the advertising or promotion' of cigarettes." Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), cert. denied, 107 S. Ct. 906 (1987).

As applied to cigarette advertising and promotion, all three provisions of S.F. 962 identified above would violate the preemption provision of the Federal Cigarette Labeling and Advertising Act. These provisions also would violate the First Amendment as applied to the advertising and promotion of all tobacco products.

1. Proposed Subdivision 1 to Section 1 of Minnesota Statutes 1986, Section 144.395 would prohibit the advertising or sale of tobacco products "on property owned or leased by the state, a political subdivision of the state, or a commission, board, agency, or other entity created or operated by the state or a political subdivision." This ban on tobacco-product advertising on public property would be a state and local prohibition of cigarette advertising, obviously forbidden by Section 1334(b) of the Federal Cigarette and Labeling Advertising Act.

This proposed ban also would violate the First Amendment. The fact that it would apply to advertising on public property is irrelevant. Even if the state and its political subdivisions are not required to open their property

to any advertising at all, once they have opened their property to commercial advertising generally, they have made that property a "public forum," from which advertisements for particular products may not be excluded simply because public authorities do not like their message. At least six federal courts have in fact invalidated comparable restrictions on advertising on public property on precisely this ground.1/

The proposed ban on the sale of tobacco products on public property would be vulnerable to challenge under the Fourteenth Amendment. A federal court in Oklahoma last spring invalidated a state ban on liquor advertising as "irrational," and therefore impermissible under the Equal Protection Clause, because the evidence did not establish that the ban would have any effect on overall levels of alcohol consumption in the state. Oklahoma Broadcasters Ass'n v. Crisp, No. Civ-81-1756-W (W.D. Okla. May 30, 1986). The proposed sales ban would suffer from the same type of defect. It simply could not be demonstrated that banning the sale of tobacco

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1/ See Planned Parenthood Ass'n v. Chicago Transit Authority, 767 F.2d 1225, 1232-33 (7th Cir. 1985); Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893, 896 n.6 (D.C. Cir. 1984); Penthouse Int'l, Ltd. v. Koch, 599 F. Supp. 1338, 1346-50 (S.D.N.Y. 1984); Coalition for Abortion Rights v. Niagara Frontier Transp. Authority, 584 F. Supp. 985, 988 (W.D.N.Y. 1984); Gay Activists Alliance v. WMATA, 5 Media L. Rep. (BNA) 1405, 1407-09 (D.D.C. 1979); Preterm, Inc. v. MBTA, No. 74-159-M, slip op. 3 (D. Mass. May 13, 1974) (preliminary injunction), appeal dismissed, No. 76-1099 (1st Cir. June 3, 1976) (per curiam).

products on public property would accomplish the state's presumed goal of reducing tobacco-product consumption.

2. Proposed Subdivision 2 to Section 1 of Minnesota Statutes 1986, Section 144.395 would provide that anyone who purchases billboard or other outdoor advertising space or service to advertise tobacco products must purchase an equivalent amount of service or space "to be used for public service messages provided by the commissioner of health for the promotion of nonsmoking or the presentation of information about the hazards of smoking." As applied to cigarette advertising, this requirement would violate Section 1334(b) of the Federal Cigarette and Labeling Advertising Act as a forbidden state "requirement or prohibition" of cigarette advertising or promotion.

In addition, this requirement would represent as great an intrusion on the First Amendment as an outright ban on tobacco-product advertising. It would, in fact, present an even more far-reaching and dangerous precedent than would an outright advertising ban.

The requirement that an advertiser purchase an equivalent amount of advertising for the messages of his adversaries offends the First Amendment in two distinct ways.

First, the requirement singles out a particular group of speakers with a particular commercial message and effectively doubles the cost of advertising for that group based solely on the content of their message. The burden

placed on these speakers -- in effect, a 100-percent tax on every dollar spent on outdoor tobacco-product advertising -- is a discriminatory inhibition on protected speech forbidden by the First Amendment.

If the goal of this requirement is to discourage tobacco-product advertising by making such advertising prohibitively expensive, then the requirement is invalid as an attempt to suppress protected expression. Even if its goal is not to discourage tobacco-product advertising, the United States Supreme Court repeatedly has made clear that using the taxing power in a way that discriminates against particular speakers on the basis of their message violates the First Amendment.2/

Second, the requirement impermissibly forces a speaker to pay for the messages of his adversaries. The Supreme Court has made clear that the government may require an advertiser to include in his advertising such qualifying information as may be deemed necessary to prevent an advertisement from being false or misleading. Implementing this principle, Congress has determined what additional qualifying information should be required for tobacco-product

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2/ See Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Speiser v. Randall, 357 U.S. 513, 518 (1958); Cammarano v. United States, 358 U.S. 498, 513 (1959); Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983).

ivertising. Such advertising carries the information equired by Congress.

But the Supreme Court has never suggested that an ivertiser may be required to buy his adversaries the opportunity to disseminate their messages. In fact, last year the upreme Court struck down on First Amendment grounds a state agency's requirement that a utility include messages of its adversaries in the utility's monthly billing envelopes. PG&E v. PUC, 106 S. Ct. 903, 911 n. 12 (1986). Such a requirement also violates the long-standing rule that a speaker cannot be compelled to "be an instrument for fostering" a message with which he disagrees.3/

The implications of requiring tobacco-product advertisers to sponsor antitobacco messages are at once far-reaching and frightening. Some who favor a ban on tobacco-product advertising argue that the health problems associated with tobacco are so unique that banning tobacco-product advertising will not serve as a precedent for banning advertising of other lawful products whose use or consumption some authorities deem to be harmful or unwise. No such assurance can be offered in the case of a requirement that advertisers sponsor messages by their adversaries.

3/ Wooley v. Maynard, 430 U.S. 705, 715 (1977). See also West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

If tobacco-product manufacturers can be required to sponsor public service messages concerning the health problems associated with tobacco, it will not be long before similar requirements are proposed for advertisers of such products as alcoholic beverages, sweetened cereals, and high-cholesterol foods. Oil companies and automobile manufacturers could be required to sponsor messages pointing out the pollution hazards presented by large-engine automobiles that use high-test gasolines. Pesticide manufacturers could be required to sponsor messages concerning the environmental and health risks associated with their products.

The United States Court of Appeals for the District of Columbia Circuit held in 1971 that nothing about the alleged hazards of cigarettes permitted the Federal Communications Commission to require antitobacco messages to be broadcast, while declining to require messages to be broadcast concerning the hazards associated with other advertised products. See Friends of the Earth v. FCC, 449 F.2d 1164, 1169 (D.C. Cir. 1971). The FCC was not allowed to distinguish between cigarettes and other products in imposing its counter-advertising rule.4/

4/ Under the FCC's rule, it should be stressed, the tobacco companies were not required to pay for the antitobacco messages of their adversaries; and it was only because the broadcast media are subject to special control by the government that counter-advertising could be required at all.

In short, the requirement of S.F. 962 that tobacco-product advertisers purchase an equivalent amount of outdoor advertising space for anti-smoking messages not only is preempted by the Federal Cigarette and Labeling and Advertising Act. It would violate the First Amendment and set a precedent that would quickly be applied to support similar requirements for advertisers of other products.

3. Proposed Subdivision 2 of Section 4 of Minnesota Statutes 1986, Section 325F.77 would make Minnesota's ban on the distribution of free cigarette samples -- which now applies only to sampling to minors -- an absolute prohibition on all sampling.

Such an absolute prohibition is preempted by the Federal Cigarette Labeling and Advertising Act as a forbidden state prohibition of cigarette promotion. Consumer sampling by means of free cigarette distribution is a traditional and recognized form of marketing and promotion, which Congress elected to allow.

As a means of advertising the existence, availability, and characteristics of individual brands, cigarette sampling also is protected by the First Amendment. To the extent that a sampling ban is intended to limit consumers' awareness of particular brands, it would be unconstitutional.

Existing law already prohibits sampling to minors. e tobacco industry and the companies retained to conduct mpling are committed to observing this prohibition. It is

unsound policy -- "government on the cheap" -- to ban sampling to adults simply because the state is not willing to enforce the existing statutory prohibition on sampling to minors as may be necessary to prevent abuses.

CONCLUSION

For the reasons discussed above, the restrictions on tobacco-product advertising and promotion addressed in this statement are preempted by federal law and would violate the First Amendment.

The CHAIRMAN. Congressman Neal, we are glad to have you.

Mr. NEAL. Thank you, Senator, very much.

Let me say I am very much aware of your sincere efforts on behalf of the health of the American people, and I certainly respect those.

I want you to understand if you will that I am here on behalf of my constituents. We have at least 8,000 people who work at Reynolds; another 1,400 of my constituents work at American; we have literally thousands of people who make their living directly as tobacco farmers, and others indirectly, in fertilizer, fuel, and as warehousemen. In fact, almost everything in our part of the country, one way or another, is touched by the tobacco economy.

The income from this economy provides the money for the churches and the schools and the parks and the hospitals and in fact everything that comprises a community.

Mr. Chairman, our economy is steadily diversifying, but tobacco is still a bedrock industry. Not only do these people provide the revenue that provides for our communities; the companies are good corporate citizens and contribute to education and so on.

I mention all of this because I need for the committee to know that the tobacco industry is not just some faceless, nameless machine, pumping out packs of cigarettes. Tobacco is produced by thousands of good, decent, hardworking people, the same kind of people that you represent in your own State. They work in an industry that has existed since before the founding of our Republic; they produce a legal product that is purchased and used by about a third of all adult Americans, including hundreds of thousands of your own constituents.

The tobacco industry employs over 700,000 people in the United States. If you add up its total economic impact, it probably accounts for more than a million jobs. Tobacco taxes yield over $11 billion in Federal, State and local government revenue.

Mr. Chairman, I just want to point out that the people who grow, manufacture, sell and use tobacco products have made important contributions to this country; they continue to; they deserve our respect, courtesy, and a fair hearing. They should not be subjected to ridicule or harassment. They should not be discriminated against any more than any other America.

Now, I would just point this stack of paper out to you. This is over 40,000 signatures, I am told, of people mostly from our part of the country who responded immediately, just during the month of March, signing a petition that was circulated because of the comments of Secretary Sullivan. It disappoints and offends us when Secretary Sullivan and others refer to people in the tobacco industry as "merchants of death", characterize their wages as "blood money" and equate them with drug dealers.

Secretary Sullivan's harsh speeches and comments about tobacco are unwarranted and unprecedented. Many of us wonder why he publicly exhibits more interest in tobacco than in health care costs, AIDS, drug and alcohol abuse, the elderly, the handicapped, the homeless, and other matters that are in his purview in his department.

When we consider the smoking and health question and what the government's role should be, it should be in an appropriate

context, Mr. Chairman, and I think that appropriate context is one of individual freedom. Our society has long valued and protected the people's right to choose, to make personal decisions without government interference. That right is guaranteed by the U.S. Constitution. It is the essential difference between our system of government and the totalitarians.

It is ironic, Mr. Chairman, that just when many countries are overthrowing totalitarian governments and demanding freedom in Eastern Europe, Africa, China, Latin America and so on, many groups in this country want to move in a different direction.

We have recently seen efforts to impose government censorship of art, books, records, to have government make personal decisions for individual Americans on abortion, for example, to subject people to random lie detector/drug tests, to keep out of the country or muzzle people the government does not like, to impose limits on our political system, to limit personal choice.

Some of you may be saying, well, that's not what we are talking about here today—but I think it is. These are all examples of attempts to substitute government decisionmaking for that of individuals.

Mr. Chairman, cigarettes are and always have been a legal product in the United States; millions of Americans have chosen to smoke them notwithstanding the health warnings on every package and in every advertisement. We have no right to punish the individuals who make that choice however much we may disagree, nor should we harass or ridicule the makers of the products they choose to buy.

Many products are said to be hazardous to our health. If the government attacks tobacco, what comes next—high-powered cars, alcohol, meat, butter, ice cream and other high-fat products, salt, sugar, coffee, snack foods? Is the government going to tell Americans what they can eat?

Just last week the *New England Journal of Medicine* published a study indicating that women who are overweight have a vast greater chance of suffering heart attacks and heart disease. According to the *Washington Post*, one researcher said that being overweight is almost as dangerous for the heart as smoking. So what does this suggest? Should we establish a center for weight control and exercise? Should the government punish people who don't take care of themselves, people who don't eat broccoli, run their laps, do their pushups? Maybe each overweight American should pay an additional tax for every excess pound. That should reduce the Federal budget deficit in a hurry. We could call it the "fat tax".

Well, I certainly wouldn't have the nerve to introduce such a bill, Mr. Chairman—it is silly, of course, but I am trying to make a serious point. Who decides—the individual or our government?

I must say I think the bills before us are based on the premise that the American people cannot decide for themselves. It would spend millions of dollars telling people things they already know and seeking to regulate their personal behavior.

Mr. Chairman, if there is an American today who does not know about the health warnings on tobacco, he or she must be living in a closet with the lights out. I am told that in 1987, HHS spent $40 million on anti-smoking programs. Surveys have shown that 99

percent of the public knows about the Surgeon General's warnings. An HHS survey showed that 95 percent believed that smoking increased the risk of lung cancer. Ninety-two percent believed it increased the risk of emphysema. Ninety-one percent believed it increased the risk of heart disease.

Not only has the message been heard; it clearly has been taken to heart. One of every two American smokers has quit in recent years. Between 1965 and 1985, 41 million people gave up smoking, I am told, and nine out of ten did it without outside help, according to the 1988 Surgeon General's Report.

Why, then, in this time of budget stringency and staggering deficits should we spent $200 million in 1 year to tell people that smoking is hazardous? There are better uses for the money.

Mr. Chairman, I must say also that I believe this bill would do a disservice to public health by making cigarettes a target of the anti-drug programs. This would equate tobacco with hard drugs like cocaine and heroin. Do we really want to say to young people that cocaine and heroin are not much different from cigarettes? Does anyone in this room really believe that? Would anyone suggest that it is as easy to quit heroin or crack as it is to quite smoking?

To equate tobacco with hard drugs trivializes our very serious drug problem.

In conclusion, Mr. Chairman, I think this legislation would create an expensive and intrusive bureaucracy. It would flood the State and local governments and private groups with grants to conduct anti-smoking programs, again, to tell people things they already know. It would allow States and localities to impose their own advertising regulations, creating a patchwork of conflicting rules and policies. It is a back door attempt to eliminate cigarette advertising, a step that would do further damage to constitutional principles.

As manufacturers of a legal product, cigarette companies have a right to advertise their goods. Advertising is a form of free speech guaranteed by the First Amendment. Prohibiting it would be a dangerous precedent indeed.

Mr. Chairman, thank you for letting me testify before you. I know of your concern for the health of the American people. But I would urge you to help maintain our basic freedoms also.

I thank you.

[The prepared statement of Mr. Neal follows:]

TESTIMONY OF REPRESENTATIVE STEPHEN L. NEAL
FIFTH DISTRICT, NORTH CAROLINA

U.S. Senate Committee on Labor and Human Resources
Hearing on The Tobacco Education and Health Protection Act (S.1883)
April 3, 1990

Mr. Chairman, I appreciate the opportunity to testify.

I am here on behalf of my constituents. The R.J. Reynolds Tobacco Company employs about 8,000 people in my hometown of Winston-Salem. The American Tobacco Company employs about 1,400 people in Reidsville. In addition, I represent thousands of tobacco farmers and thousands of others employed in tobacco-related industries.

Mr. Chairman, our economy is steadily diversifying, but tobacco is still our bedrock industry. Each year, RJR alone pumps more than $1.3 billion into our area's economy, including salaries, taxes, and purchases of goods, services and tobacco.

RJR is an outstanding corporate citizen; it has been our community's key building block. Tobacco income has built our homes, supported our schools, churches, charities, parks and everything else that constitutes a community.

Mr. Chairman, over the last five years RJR has contributed more than $20 million to local charities and organizations. For example, RJR recently gave $4 million to help strengthen Winston-Salem State University, a historically black institution that is important to our community. RJR gave nearly $1 million to this year's United Way campaign. Nationally, the RJR Nabisco Foundation, is funding a five-year, $30 million program to encourage innovation in public school classrooms. I could cite countless other examples.

American Tobacco, in addition to its $56 million annual Reidsville payroll, has made charitable contribututions of another $1.3 million in our area over the past decade. In addition to corporate contributions, of course, thousands of individual workers and thousands of farmers also support our community institutions.

I mention all this, Mr. Chairman, because I want this committee to know that the tobacco industry is not some faceless, nameless machine pumping out packs of cigarettes. Tobacco is produced by thousands of good, decent, hardworking people--the same kind of people you represent in your own states.

They work in an industry that has existed since before the founding of our Republic. They produce a legal product that is purchased and used by about a third of all adult Americans, including hundreds of thousands of your own constituents.

The tobacco industry employs about 700,000 people in the United States; if you add up its total economic impact, it probably

accounts for more than a million jobs. Tobacco taxes yield about $11 billion a year in federal, state and local government revenue. If you don't think tobacco revenue is important, just ask your state revenue department. Ask the Office of Management and Budget.

My point, Mr. Chairman, is that the people who grow, manufacture, sell and use tobacco have made important contributions to this country. They deserve respect, courtesy and a fair hearing. They should not be subjected to ridicule or harassment.

It disappoints and offends us when HHS Secretary Louis Sullivan and others refer to people in the tobacco industry as 'merchants of death,' characterize their wages as "blood money," and equate them with drug dealers.

Secretary Sullivan's harsh, hyperbolic speeches and comments about tobacco are unwarranted and unprecedented. Many of us wonder why he publicly exhibits more interest in tobacco than in health care costs, AIDS, drug and alcohol abuse, the elderly, the handicapped, the homeless, and other matters in his department. Could it be because he gets better press by attacking tobacco?

When we consider the smoking and health question, and what the government's role should be, we should do so in an appropriate context. I think the proper context is one of <u>individual freedom</u>.

Our society has long valued and protected the people's right to choose--to make personal decisions without government interference. This right is guaranteed by the United States Constitution; it is the essential difference between our system of government and the totalitarian systems.

It is ironic, Mr. Chairman, that when many countries are overthrowing totalitarian governments and demanding freedom--in Eastern Europe, Africa, China and Latin America--many groups in this country want to move in the opposite direction.

We have recently seen efforts to impose government censorship of art, books and records--to have government make personal decisions for individual Americans, on abortion, for example--to subject people to random lie-detector and drug tests--to keep out of the country or muzzle people the government doesn't like.

Some of you may be saying, well, that's not what we are talking about here today. But I think it is. These are all examples of attempts to substitute government decisions for those of individuals. I think we could say the same about S. 1883. I know that you sincerely want to improve the public health, Mr. Chairman. I don't question your good intentions. But I think this is bad legislation.

J-Neal

Cigarettes are and always have been a legal product in the United States. Millions of Americans have chosen to smoke them, notwithstanding the health warnings on every package and in every advertisement. We have no right to punish the individuals who make that choice, however much we disagree, nor should we harass or ridicule the makers of the products they choose to buy.

Many products are said to be hazardous to our health. If the government attacks tobacco, what comes next? High-powered cars? Alcohol, certainly. Meat, butter, ice cream and other high-fat products? Sugar? Salt? Coffee? Snack foods? Is the government going to tell Americans what they can eat?

Just last week, the New England Journal of Medicine published a study indicating that women who are overweight have a vastly greater chance of suffering heart attacks and heart disease. According to The Washington Post, one researcher said that being overweight is almost as dangerous for the heart as smoking.

So what does this suggest? Should we establish a Center for Weight Control and Exercise? Should the government punish people who don't take care of themselves--people who don't eat broccoli, run their laps, do their push-ups? Maybe each overweight American should pay an additional tax for each excess pound; that should reduce the federal budget deficit in a hurry. We could call it the Fat Tax.

I certainly wouldn't have the nerve to introduce such a bill, Mr. Chairman. This is silly, of course, but I am trying to make a serious point: Who decides? The government or the individual?

S. 1883 is based on the premise that the American people cannot decide for themselves. It would spend millions of dollars telling people things they already know and seeking to regulate their personal behavior.

Mr. Chairman, if there is an American today who doesn't know about the health warnings on tobacco, he or she must be living in a closet with the lights out. I'm told that in FY1987, HHS spent $40 million on anti-smoking programs. Surveys have shown that 99% of the public knows about the Surgeon General's warnings. An HHS survey showed that 95% believed that smoking increased the risk of lung cancer; 92% believed it increased the risk of emphysema; 91% believed it increased the risk of heart disease.

Not only has the message been heard; it clearly has been taken to heart. One of every two American smokers has quit in recent years. Between 1965 and 1985, 41 million people gave up smoking, and 9 out of 10 did it without outside help, according to the 1988 Surgeon General's Report.

Why, then, in this time of budget stringency and staggering deficits, should we spend $200 million in one year to tell people that smoking is hazardous? There are better uses for this money; the members of this committee, especially, should know that.

Moreover, S. 1883 would do a disservice to public health by making cigarettes a target of the anti-drug programs. This would equate tobacco with hard drugs like cocaine and heroin. Do we really want to say to young people: "Cocaine and heroin are not much different from cigarettes?" Does anyone in this room really believe that? Would anyone suggest that it is as easy to quit heroin or crack as it is to quit smoking? To equate tobacco with hard drugs trivializes our very serious drug problem.

S. 1883 would create an expensive and intrusive bureaucracy, establishing a Center for Tobacco Products within the Centers for Disease Control. It would flood state and local governments and private groups with grants to conduct anti-smoking programs--again to tell people things they already know.

It would allow states and localities to impose their own cigarette advertising regulations, creating a patchwork of conflicting rules and policies. S. 1883 is a back door attempt to eliminate cigarette advertising--a step that would do further damage to constitutional principles. As manufacturers of a legal product, cigarette companies have a right to advertise their goods. Advertising is a form of free speech, guaranteed by the First Amendment. Prohibiting it would be a dangerous precedent indeed.

This bill reminds me of the story about the little boy who cut off the dog's tail an inch at a time--so it wouldn't hurt so much.

S. 1883 is not needed, Mr. Chairman. It would waste scarce resources, encourage burcaucratic excesses, and intrude on individual rights.

As your committee considers questions of smoking and health, I urge that you do so with respect for individual freedom, with respect for the intelligence of the American people, and with respect for the hundreds of thousands of Americans who work in the tobacco industry.

Thank you, Mr. Chairman, for letting me be here today to give you the perspective of a tobacco-producing state.

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The CHAIRMAN. Thank you very much, Congressman Neal.

We appreciate both of you coming here. We know you have differing views on this issue, but we obviously welcome hearing your views on this matter.

I know first of all the work of Congressman Luken, who spent a good deal of time having his own hearings and studying this issue in very considerable detail. He brings to our hearing a good deal of background and experience and knowledge about this question.

I think one of the obvious directions of this legislation is to try and focus on the young people and the particular appeal that has been made as to the effects of advertising tobacco products on young people.

Do you believe that communities should have the right, indeed, that it is essential for them to be able to protect themselves from saturation advertising, outdoor advertising of tobacco products?

Mr. LUKEN. Yes, Senator. In addressing the subject, I think you have correctly stated the point, that young people are vulnerable and susceptible to suggestion. One of the tennis stars in the Virginia Slims Tournament was recently quoted as saying, "When young people think of Virginia Slims, they don't think of cigarettes; they think of tennis." Now, she didn't realize in saying that—she was trying to defend the Virginia Slims Tournament—but she did not realize that she was making the case for really banning that kind of promotion because the young person who thinks of Virginia Slims as tennis is likely to be induced or led toward a favorable notion of Virginia Slims, which just happens to be the death-dealing cigarettes.

And absolutely, the tobacco companies shouldn't have the immunity which they now claim to have and which they often do have, which other products don't have, from local regulation. What happens is in the communities—and again, we are talking about targeting, we are talking about people who are particularly vulnerable—so many times, in the low-income areas, in the areas where the targeted group is for whatever it is—and that is what Secretary Sullivan objected to, the particular targeting of black people in neighborhoods which are predominantly black—where these communities should have the right, as they do with other products, to regulate the billboards and any other advertising. Absolutely– they should have more right here, because as a practical matter—let me add just one thing where I might disagree with my respected colleague—I don't think drugs have rights. And that is what they are arguing. Certainly, people have rights; people who are charged have rights. But we can't say that drugs have rights just because of this idea that they are legal.

Many prosecutors today urge the legalization or the decriminalization of cocaine and even heroin because they figure that's the best way to administer the whole program with regard to dealing with them. That doesn't mean that we would then permit the advertising through sexy and other kinds of alluring ways of cocaine or heroin. There is no more dangerous product than tobacco, and it should not be considered to have rights.

The CHAIRMAN. What is your reaction to the increase in these free coupons that make it possible to get cigarettes free?

Mr. LUKEN. Well, coupons is like samples or like vending machines. It allows the laws to be circumvented. There are State laws in most of the States which prohibit the sale of cigarettes to young people.

That is another argument about legality. It isn't legal to sell cigarettes to young people, and it shouldn't be legal to advertise cigarettes to young people, either. And if they are being distributed through coupons, as Congressman Henson and one of the other Congressmen had their constituents come in, and children from their districts, young children under the age of 12, received samples in the mail, received advertising in the mail, received T-shirts and so on in the mail. Any kind of distribution such as that will end up with the young people having a right to violate the law, to purchase cigarettes, to obtain it through coupons, vending machines or through samples.

The CHAIRMAN. Congressman Neal, I know that Secretary Sullivan can certainly speak for himself and defend himself, but as the chairman of the health committee, I think it is appropriate to mention that he does focus a great deal of his time and energy on a wide range of different health care issues. There are some that we differ on—the results of the Pepper Commission, for example. But we have worked very closely with him on a wide range of different health issues, some of which you have mentioned: AIDS, minority health, the fashioning and shaping of the Administration's program on substance abuse, trying to deal with the demand side through education, treatment, rehabilitation, and in pharmaceutical research, particularly as we are finding more and more babies who are born addictive.

So he has spent a good deal of time on a number of different health issues as well as this particular one. I thought I would mention that because I do think that he has taken a very strong and strenuous position, one which I support and you differ with. But I think it is important that as he has focused on this issue, he has certainly been attentive to others.

I do also want to point out that I am extremely sympathetic to those people who are in the growing industry, the tobacco farmers. I think we have a real responsibility to them. As you mentioned, you are moving toward diversity in your own district. There are some economists who believe that the growing of tobacco will move overseas in any event because it is cheaper to produce it. So whatever is going to happen with regard to the tobacco farmers, I think we should be concerned about them.

I am familiar enough with the challenges and problems to know that generally, by and large, they are the smaller farmers, and they have diversified, but many of them have these single crops.

So I am working with a number of members and colleagues who also are opposed to this legislation, to at least try and provide some response to their particular needs. I think we must make progress in terms of what I consider to be a health issue, and if it is in the common interest of the country, we ought to be responsive to those that you have mentioned. I will say that at the outset.

Now, having said that, I do find your logic troublesome in terms of not permitting local communities greater flexibility to make determinations to protect their health. I heard you list a number of

different areas of public policy, which I gather you believe are being dictated by national policy here in Washington. It would seem to me that leaving some of these health issues up to the will of local communities in terms of advertising and location of advertising would have some appeal—I know it does have appeal in many parts of the country including the South.

We find, for example, in North Carolina under your general statutes affecting alcoholic beverages, that in the area of advertising, you say "No person shall advertise alcoholic beverages in this State except in compliance with the rules of the commission," and then further on it says "Rulemaking authority. The commission shall have the authority to adopt rules to"—in paragraph 7—"prohibit or regulate alcoholic beverage advertisement on billboards; prohibit alcoholic beverage advertisements on outdoor signs; regulate the nature, size, number and appearances of those advertisements; prohibit or regulate the advertisement of alcoholic beverages by mail; prohibit or regulate contests, games or other promotions on alcohol." Now North Carolina is saying that, in this particular area of public policy, they are glad to leave it up to local control.

Now, if this is good enough for alcohol, why isn't it good enough with regard to tobacco?

Mr. NEAL. Well, Senator, frankly, I think the attempts to allow the local communities to set up separate schemes controlling advertising were designed with the purpose in mind of making it as difficult as possible to sell these legal products. A manufacturer would find it very difficult, for instance, if local jurisdictions required different kinds of warning statements and so on. It would be impossible for a manufacturer to make products tailormade to every local community or many different local communities.

So it seems to me that that is an attempt to sort of do by the back door what we don't want to do by the front door, and that is make these things unavailable or make them illegal.

Now, I asked my friend Tom Luken——

The CHAIRMAN. Do you feel that way about guns?

Mr. NEAL. Do I feel that way about making guns illegal?

The CHAIRMAN. I mean gun control; do you think it ought to be national, or do you think those things ought to be regulated by the States?

Mr. NEAL. Well, personally, I am not in favor of most of the gun control schemes, either, but I see that a little far afield from what we are talking about.

The CHAIRMAN. Well, you are talking about different situations in different communities, and I'm just asking if you've got a consistent view. If we say that——

Mr. NEAL. I'm not sure I always have a consistent view. I'm not arguing with that.

The CHAIRMAN. Well, that's an honest politician. I think we can all empathize with that. We never want to put that to the test around here.

Mr. NEAL. I should not——

The CHAIRMAN. Well, let me move on.

Mr. NEAL. May I just make one brief comment on this, if I may, because I really think this gets to the heart of it. I mentioned to my friend, Mr. Luken, when I testified before his committee on the

same subject, I said, Tom, what you really want to do is just outlaw these things, right, make them illegal? And Tom, my friend, says that he does.

But Tom isn't running again. And I doubt that there are many folks around here who would want to introduce legislation to make cigarettes illegal and then go home and tell their constituents, the third of them who smoke, that they think they ought to be considered as criminals under the Federal Criminal Code.

So frankly, Senator, I think these attempts to allow local advertising and all this kind of stuff are just ways to do through the back door what we are unwilling to do right up front, I imagine a lot of the people who are doing all this kind of stuff want to outlaw. So I say if you do, why not just introduce legislation to do that?

The CHAIRMAN. Well——

Mr. LUKEN. Senator, my name has been mentioned, and I claim privilege.

The CHAIRMAN. Yes.

Mr. LUKEN. And I suggest that my not running again gives me a lucidity, a clear-eyed vision, that may be denied some of the others here.

But I also might say that I have been saying the same thing for quite a number of years, and I have been running during that period.

Mr. NEAL. Well, anyway, he is a great Congressman, but I don't think most of us want to tell our constituents that we think they ought to be treated like criminals—and yet that is what this is all about, I think.

The CHAIRMAN. Well, that isn't really what this legislation is about. What we are talking about is counter-advertising. Not to give $3.2 billion for advertising on the one hand, and virtually nothing on the other hand, but rather to give people the opportunity for additional information. You quote skewed statistics on the number of people who know that there is some danger. The fact is those who are most vulnerable, who come into the whole process fresh—the younger people—if you examined those statistics, you would find that they are uninformed.

Why should we treat smoking differently from food and other items where the public has the right to know what is going into those products. Why don't we leave some control within the local communities to make local judgments on these issues?

But I respect your position, and I am sure your constituents do.

The final bell has just rung. Unless you have anything else to add, what I'm going to do is recess the hearing and go to vote, and then we'll come back with our second panel? Is that satisfactory, Congressmen—I don't want to cut you off.

Mr. NEAL. I had some others who wanted me to submit their testimony, if you would accept that.

The CHAIRMAN. Yes. We'll include your testimony, and if there is anything else you want to add, we'll leave the record open.

Mr. NEAL. Thank you, Senator.

Mr. LUKEN. Thank you very much.

The CHAIRMAN. Thank you for coming over.

The committee will stand in recess.

[Short recess.]

The CHAIRMAN. We'll come to order.

We apologize to our witnesses for the interruptions. I think most of them, as I look through the witness list, are familiar enough with the process of this institution to understand, but nonetheless I do apologize for the interruptions.

Our second panel—if they would be good enough to come forward—include Officer Bruce Talbot, Woodridge Police Department, Woodridge, IL, who has been very instrumental in the DARE Program; John J. Joyce, executive director of the Maine Grocers' Association in Augusta, ME—I am sure Senator Mitchell would want me to extend a warm word of welcome to you—and Peter Strauss, president of the National Association of Tobacco Distributors, Alexandria, VA; I am sure both Senator Warner and Senator Robb would want me to welcome you, as I am sure Paul Simon, who is a member of this committee, would want to welcome you, Officer Talbot.

STATEMENTS OF OFFICER BRUCE R. TALBOT, WOODRIDGE POLICE DARE PROGRAM, WOODRIDGE, IL; JOHN J. JOYCE, EXECUTIVE DIRECTOR, MAINE GROCERS' ASSOCIATION, AUGUSTA, ME; AND PETER STRAUSS, PRESIDENT, NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS, ALEXANDRIA, VA

The CHAIRMAN. We'll start off with Officer Talbot.

Mr. TALBOT. Senator Kennedy, thank you very much.

As a police officer assigned to teach over 1,500 students a 17-week drug prevention program, I'd like to voice my support for the Tobacco Product Education and Health Protection Act of 1990. This bill will not only help prevent nicotine addiction among young people, but I believe it will also be a major factor in the prevention of illicit drug abuse. It is a national approach to a national epidemic affecting our Nation's future—the health and welfare of our children.

Woodridge, IL is addressing this issue in a unique manner that has reduced tobacco sales to minors from 83 percent to zero. But without this Federal legislation, our local efforts may have been for naught, because the merchants whose stores border Woodridge continue to sell cigarettes to 13 year-old children 94 percent of the time.

Let me share with you my experience to show you why this legislation is needed.

While teaching the Drug Abuse Resistance Education, DARE, Program at Jefferson Junior High School, I received complaints from teachers, parents, and even students themselves that Woodridge merchants were selling cigarettes to minors. On one occasion, a gym teacher observed a 13 year-old female student purchase a pack of Marlboros from a Mobil Oil gasoline station just two blocks from school. The teacher reported the occurrence to the principal, as student possession of cigarettes is a violation of school regulations. The principal suspended the girl after calling her to the office and finding the cigarettes in her purse. He then met with me and asked, "Isn't there something you can do? Isn't it illegal to sell cigarettes to 13 year-old students?"

Illinois State law prohibits the sale of tobacco products to anyone under the age of 18. However, the law was adopted in 1887 and carries a penalty of only $50. Now, that may have been a great deal of money in 1887, but it is hardly a deterrent today.

This old law exempts a child of any age if they possess a note from a parent, effectively making it unenforceable.

The Woodridge police response to the principal's complaint was to send a letter to each tobacco selling merchant from the chief of police. This letter related the complaints and advised that tobacco sales to 13 year-old children runs counter to the anti-drug programs the community had undertaken. The letter closed with a warning that arrests would be made under the State law if repeat violations occurred.

The school approved of the response, and the police department felt the matter was closed—until I saw a news report of a study done in Chicago by DePaul University. That study found that 87 percent of Chicago merchants sold cigarettes to minors in violation of the State 18-year age limit.

I phoned the author, Dr. Leonard A. Jason, and told him that we had the same problem in Woodridge and that we solved it with our police letter. But Dr. Jason immediately shot back and said, "How do you know you have solved that problem? You won't know it until you scientifically test for it."

Of course, Dr. Jason was right. We had hoped that our merchants would comply. After all, what adult really would sell cigarettes to a 13 year-old child after being warned by the police?

Unfortunately, they did continue to sell. Dr. Jason advised us how to replicate his Chicago study and supervised its execution. We used 13 year-old students because that is the average age now that children begin to smoke, and it was the age of the child in the school complaint. The study found that 83 percent of Woodridge merchants continued to sell to junior high-age students after being warned in writing by police that such sales violated State law.

Given the 87 percent sales rate in the DePaul Chicago study where no warning was given, the Woodridge police warning had absolutely no effect.

Faced with an unenforceable State law and a continuing violation, I wrote a city ordinance that requires a special license to sell tobacco products. The Woodridge tobacco license law is similar to a liquor license in that sales to minors result in a suspension of the merchant's license to sell tobacco and a fine of up to $500. Repeat offenders are subject to a license revocation.

The law requires remote-controlled electronic lockout devices on cigarette vending machines that are accessible to minors in addition to the tobacco license. Any attempt to defeat the lockout or releasing the lockout for a minor results in a license suspension.

A warning sign provided by the city is required in each store. In addition, free distribution of tobacco products is limited to a licensed merchant's store—no license or free delivery is permitted within 100 feet of any school, child care facility, or other building used for educational or recreational programs for children.

It is important to understand that the Woodridge tobacco license law is a civil action as opposed to a criminal action. A license action is heard in an informal hearing before our city's mayor, not

in a misdemeanor criminal court with long delays and expensive legal motions.

During the first police enforcement of this new law, 33 percent of Woodridge merchants continued to sell. The mayor, following past precedent on liquor license actions involving sales to minors, issued a written warning and no fine. On the second enforcement, only 10 percent of merchants sold. These stores received a one-day license suspension and a $400 fine. On the third and fourth enforcement, none of the merchants sold cigarettes to the 13 year-old student, including all of the vending machines.

According to Dr. Leonard A. Jason of DePaul University, Woodridge is the first community in America to document 100 percent compliance with tobacco age restrictions.

However, the data from the merchants surrounding and just outside the jurisdiction of Woodridge is shocking. Despite full-page coverage in the *Chicago Tribune* and evening news features from two Chicago television stations, 94 percent of the merchants just outside the reach of our ordinance continued to sell to 13 year-old children, usually with no questions asked.

It is clear from our study that Woodridge, IL has solved only part of its tobacco sales problem. Because of urban sprawl, Woodridge adolescent cigarette smokers merely walk across the street to Downer's Grove, Darien or Lisle to buy their cigarettes. Woodridge, of course, has no control over other communities' merchants.

Many people view smoking as a freedom of informed adult choice, and I have no problem with that. Few would argue that the 13 year-old students used in this study possess the knowledge or emotional maturity to make an informed decision on smoking. However, it is clear from this data that we see in this study that 13 year-olds are buying large quantities of cigarettes. And what we really find is that the current 13 year-old smoker will have his adult freedom of choice stolen away from him by nicotine addiction.

One purpose of government is to protect those who are unable to protect themselves from danger. Certainly the protection of 12 and 13 year-old children from easy access to large quantities of cancer-causing, addicting drug should be the responsibility of government.

Without a national approach to this problem, even the best laws, diligently enforced, can be defeated by neighboring communities and States whose priorities lie elsewhere. America is such a mobile country that we find that regulations regarding drugs must be national to be effective.

We have learned this lesson with drunk driving. Illinois had an 18-year age limit; we brought it to 21 to stop our drunk driving deaths. But Wisconsin, our neighbor to the north, continued with a lower age limit. Until the Federal Government brought in a Federal law of 21, our drunk driving deaths did not go down.

In concluding, I would like to make a case for adolescent cigarette smoking as a "gateway drug" to illicit drugs. There are many studies that show that children, adolescents, who use tobacco go on to graduate to illicit drugs. But I have observed as a police officer, teaching this drug program, that there is a very real physical effect that makes a direct connection with these statistics. That is that a 13 or 14 year-old child has a difficult time deeply inhaling and

holding harsh marijuana smoke in their lungs unless they are first an accomplished cigarette smoker. Dr. Robert DuPont, one of the noted authorities in this country on juvenile drug abuse, says that if you can stop adolescent cigarette smoking, you will have taken a major step in reducing the gateway progression on to illicit drugs.

Thank you very much, Senator, for allowing me to make this presentation today. I hope in some small way that my remarks will help this important bill.

The CHAIRMAN. Thank you very much, Officer. We hope you will stay. I want to go through the panel so we can hear from each of the members, and then come back to some questions.

[The prepared statement of Mr. Talbot (with attachments) follows:]

Testimony of Officer Bruce R. Talbot,

Woodridge Police Department
DARE Program
One Plaza Drive
Woodridge, Illinois. 60517-4599
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Before the United States Senate Committee on Labor and Human Resources, Washington, D.C.

April 3rd, 1990

Regarding the Tobacco Product Education and Health Protection Act of 1990, S. 1883.

As a police officer assigned to teach over 1,500 students a 17 week drug prevention program, I would like to voice my support for the Tobacco Product Education and Health Protection Act of 1990. This bill will not only help prevent nicotine addiction among young people, but I believe it will also be a major factor in the prevention of illicit drug abuse. It is a national approach to a national epidemic effecting our nation's future... the health and welfare of our children.

Woodridge, Illinois is addressing this issue in a unique manner that has reduced tobacco sales to minors from 83% to zero. But without this legislation our local efforts may have been for naught, because the merchants whose stores boarder Woodridge continue to sell cigarettes to 13 year-old children 94% of the time.

Let me share with you my experience to show you why this legislation is needed.

While teaching the Drug Abuse Resistance Education, (DARE), program at Jefferson Junior High School, I received complaints from teachers, parents and even the students themselves that Woodridge merchants were selling cigarettes to minors. On one occasion a gym teacher observed a 13 year-old female student purchase a pack of Marlboros from a Mobil Oil gasoline station just two blocks from the school. The teacher reported the occurrence to the principal, as student possession of cigarettes is a violation of school regulations. The principal suspended the girl after calling her to the office and finding the cigarettes in her purse. He then meet with me and asked, "Isn't illegal to sell cigarettes to 13 year old students? Isn't there something the police can do to stop this?"

Illinois state law, (Chapter 23, section 2357), prohibits the sale of tobacco products to anyone under the age of 18. However, the law was adopted in 1887 and carries a penalty of only $50.00. That may have been a great deal of money in 1887, but is hardly a deterrent today. But of greater concern is a loop hole that makes the law virtually unenforceable. The law exempts any aged child if they possess a written note from their parent or guardian.

How is the police officer, or for that matter a reputable merchant, able to verify the authenticity of the note before enforcing the law? And even if the police could check with the parent, most parents would be unlikely to involve their child in a police action over the forged note. After closely examining the old statute the Chief of Police agreed the law was realistically unenforceable. I have not been able to find even one occasion in the state of Illinois when this law has been enforced.

The Woodridge police response to the principal's complaint was to send a letter to each tobacco selling merchant from the Chief of Police. The letter related the complaints and advised that tobacco sales to 13 year old children runs counter to the anti-drug programs the community had undertaken. The letter closed with a warning that arrests would be made under the state law if repeat violations occurred.

The school approved of the response and the police department felt the matter was closed. Until I saw a news report of a study done in Chicago by DePaul University. That study found that 87% of Chicago merchants sold cigarettes to minors in violations of the Illinois 18-year age limit. I phoned the author, Dr. Leonard A. Jason, and told him we had the same problem and solved it with the police letter. Dr. Jason shot back, "You won't know what effect your letter had on merchant behavior until you scientifically test it."

Of course he was right. We had hoped our merchants would comply. After all, would an adult really sell cigarettes to a 13 year old child after being warned by the police? The answer is yes!

Dr. Jason advised us how to replicate his Chicago study and supervised its execution. Each merchant was approached on three different days and at different times of the day in order to obtain a true sample of different clerk's behavior. The 13 year old student volunteers were told to wear jeans and sweat shirts. Girls were not allowed to wear jewelry or makeup. Each student was photographed to document their age-appropriate appearance. In all cases the student would enter the store alone and was instructed to ask for a pack of cigarettes. If asked for their age they were instructed to say 13. I observed the scene from an unmarked police car, and recorded the data after each visit.

The study found that 83% of Woodridge merchants continued to sell cigarettes to junior high aged students after being warned in writing by the police that such sales violated state law. Given the 87% sales rate in the DePaul / Chicago study where no warning was given, the Woodridge police warning had no effect.

Faced with an unenforceable state law and a continuing violation, I wrote a city ordinance that requires a special license to sell tobacco products. The Woodridge tobacco license law is similar to a liquor license, in that sales to minors results in a suspension of the merchant's license to sell tobacco, and a fine of up to $500. Repeat offenders are subject to a license revocation. The law requires remote controlled electronic lock-out devices on cigarette vending machines that are accessible to minors, in addition to the tobacco license. Any attempt to defeat the lock-out or releasing the lock-out for a minor results in a license suspension.

A sign provided by the city that reads: **"THE SALE OF TOBACCO PRODUCTS TO PERSONS UNDER EIGHTEEN YEARS OF AGE IS PROHIBITED BY LAW."**, in red one inch letters on a white background, must be posted at or near every display of tobacco products. This sign requirement was added because of a study reported in the June 26, 1987 issue of the Journal of the American Medical Association titled; "Legislative Efforts to Protect Children from Tobacco", which found that compliance with state age restrictions was highest in stores where a warning sign was posted.

The ordinance also sets a minimum age of 18 to sell tobacco. This is patterned after the minimum age to sell liquor in Illinois, and recognizes the fact that peer pressure on a 15 year old clerk to sell tobacco to a 17 year old customer might be too difficult to say no.

In addition, free distribution of tobacco products is limited to a licensed merchant's store. And no license or free delivery is permitted within 100 feet of any school, child care facility or other building used for education or recreation programs for children. A May, 1987 report from the Health and Human Services department recommended such a ban on free samples because, "...they inevitably fall into the hands of children." The 100 feet proximity ban mirrors the Illinois state liquor law and backs up the school district ban on tobacco on school grounds. This section would also address an older teen giving cigarettes to a minor at a park or other adolescent gathering point.

The final section of the Woodridge tobacco ordinance is the prohibition on possession and attempts to purchase tobacco by minors under 18. I strongly feel that adolescents must be accountable for their actions. It is unfair to place the entire onus on the merchant. To do so allows the minor to "keep shopping" until finding a merchant willing to sell. This clause also backs up the merchant who might be harassed by underage minors. Now the merchant can call the police instead of watching the minor walk across the street to his competitor. Under Illinois's liquor law, it is a violation for a minor to attempt to purchase liquor for this very reason.

Adolescents look to adults for guidelines or limits. By not addressing underage possession, society sends a confusing mixed message to minors about use of cigarettes. Illinois's 103 year old tobacco law is silent on possession by minors, and several students have asked, "If it's not any good for you, why is it legal for kids to smoke?" Woodridge is one of the few communities where it is not legal for children to smoke or even be in possession of tobacco. This is currently the law in only 12 states.

It is important to understand that the Woodridge tobacco license law is a civil action as apposed to a criminal action. A license action is heard in an informal hearing before the Mayor, not in a misdemeanor criminal court with long delays and expensive legal motions. Recently, police in Ramsey, Minnesota made criminal arrests on three working-mother store clerks who sold to a police supervised minor. The public response in the press was very negative and had a chilling effect on further police enforcement. The public response to a civil license action and fine in Woodridge has been overwhelmingly positive.

Like wise, minors found in possession are not arrested. The cigarettes are confiscated and the adolescent is given a mail-in parking ticket style citation with a $25 fine. The issuing officer is required to notify the parents, usually by phone, before the end of the shift. The minor can request a court date, only three have in the past year, which is assigned to traffic court.

After the new ordinance was passed, merchants were warned that police would be using 13 year old police special agents to check compliance with the new age restrictions. During each of the following "sting" operations, statistics were recorded for the ongoing DePaul University study. On the days of the stings DePaul University research assistants would also test all the stores surrounding but just outside the Woodridge jurisdiction, to document what effect the Woodridge law would have on area merchants.

During the first police enforcement of the age restriction, 33% of Woodridge merchants sold cigarettes to the 13 year old special agent. The Mayor followed past president on liquor license actions involving sales to minors and issued a written warning and no fine on offending merchants. On the second enforcement only 10% of merchants sold. These stores received a one day license suspension and a $400.00 fine. None of the merchants contested the hearing, suspension, or fine. On the third and forth stings, none of the merchants sold cigarettes to the 13 year old police agent, including vending machines! According to Dr. Leonard A. Jason, supervising the DePaul University study, Woodridge is the first community in America to document 100% compliance with tobacco age restrictions.

However, the data from the merchants surrounding but just outside the jurisdiction of the Woodridge tobacco license ordinance, was shocking. Despite full page coverage in the Chicago Tribune and evening news features from two Chicago television stations, 94% of the time these stores sold to 13 year old children, usually with no questions asked. It is clear from the data that Woodridge, Illinois has solved only part of its tobacco sales problem. Because of urban sprawl, Woodridge adolescent smokers merely walk across the street to Downers Grove, Darien or Lisle, to buy their cigarettes. Woodridge of course, has no control over another communities merchants. Thus far only one of the four neighboring towns have licensed tobacco sales. Downers Grove has resisted adopting a similar ordinance because the city does not issue business licenses, although they do license liquor sales.

In addition to the merchant study, we also conducted two anonymous tobacco use surveys among 650 Jefferson Junior High School students to determine what effect the new law would have on users, and if police / community relations would suffer. 93% of the 7th and 8th grade students said they knew of the new law banning possession and sales of tobacco to minors. 72% said they thought the law would help prevent them from smoking, and 55% said they thought it would deter other students from smoking. Of the 16% of students who claimed to be regular cigarette smokers, 12 years of age was the average age of first tobacco use. 15% of student smokers were already using a pack of cigarettes a day. Although the students ability to purchase cigarettes in Woodridge dropped dramatically from 83% before the law to 39% after the law was adopted, 72% of student smokers reported buying cigarettes from merchants outside of Woodridge.

Many people view smoking as a freedom of informed adult choice issue. Few would argue that the 13 year old students used in this study possess the knowledge or emotional maturity to make an informed decision on smoking. However as we have seen from this study and other reports, most notably the National Institute on Drug Abuse's, National Household Survey on Drug Use, 13 is now the average adolescents begin smoking. The 1988 Surgeon General's report, "Nicotine Addiction" states, "Cigarettes and other forms of tobacco are addicting, and is similar to addiction to drugs such as heroin and cocaine." Long term abstinence rates for adults who want to quite smoking and have participated in a formal smoking cessation program rarely exceed 25%. This failure rate is comparable to alcohol and other addicting drugs. The addicting effect on children is just as dramatic. A study by professor R. T. Ravenholt of 15 year olds who smoked as few as five cigarettes per day found; 51% had tried to stop smoking but failed, and 27% said they couldn't stop smoking no matter how hard they tried. More than half of these adolescents will remain addicted for the rest of their lives or until they eventually die of smoking related diseases. So what we really find is that the current 13 year old smoker will have his adult choice taken away by nicotine addiction.

One purpose of government is to protect those who are unable to protect themselves from danger. Certainly the protection of 12 - 13 year old children from easy access to large quantities of a cancer-causing, addicting drug, should be a responsibility of government.

Without a national approach to this problem, even the best laws, diligently enforced, can be defeated by neighboring communities and states whose priorities lie elsewhere. America is such a mobile country that regulations regarding drugs must be national to be effective.

Illinois learned that lesson with drunk driving. Illinois had lowered the drinking age from 21 to 18 during the Viet Namn war years. When teenage drunk driving deaths soared, the law was changed back to 21. But Illinois was unable to stop the senseless deaths because our neighbor to the north, Wisconsin, maintained the lower age limit. Every weekend teens would drive across the state line and then attempt to drive back to Illinois, drunk. It wasn't until the national age limit of 21 was imposed on Wisconsin that teenage drunk driving deaths were meaningfully reduced. I believe the 390,000 American lives lost to smoking addiction will not be meaningfully reduced until we address the issue of tobacco sales to 13 year old children on a national basis. I believe this bill will provide that national foundation.

In closing, I would like to make a case for controlling cigarette sales because of their use as a "gateway drug" for adolescents. Gateway drugs are drugs of first use that facilitate latter progression to more dangercus drug use. Many studies have established a statistical link between adolescent cigarette smoking and the use of illicit drugs like marijuana. The National Institute on Drug Abuse documented such a relationship as early as 1975. Their study, "Predicting Adolescent Drug Abuse", found a strong connection between junior high school student cigarette use and the use of other illicit drugs. Dr. Shapiro, writing in The International Journal of the Addictions, summarizes: "The data seem to indicate abstinence from one activity, (adolescent cigarette smoking), would inhibit experimentation and possible problems with other substances."

There is a very real physical explanation for this connection. Adolescents are unable to deeply inhale and hold harsh marijuana smoke without first becoming accomplished cigarette smokers first. In fact 92% of adolescent marijuana smokers are also regular cigarette smokers, according to the National Household Survey on Drug Use. Thus, what starts as cigarette use and addiction at 13, becomes marijuana dependence at 15, and crack cocaine smoking at 17 years of age. Rather than waiting to treat crack cocaine addiction with expensive rehabilitation, we need to focus on adolescent gateway drug prevention. According to Dr. Robert DuPont, an authority on juvenile drug abuse; "...prevention of cigarette smoking is a high priority in the prevention of dependence on all drugs."

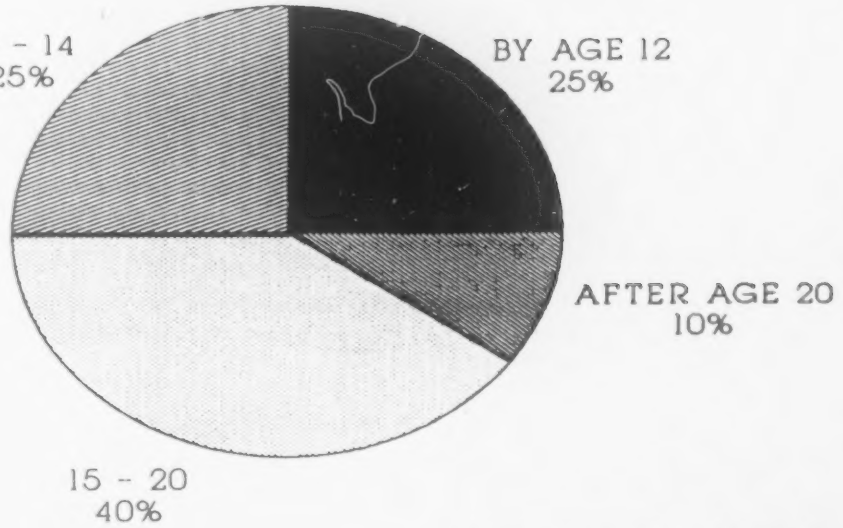
I want to thank the Committee for allowing me to make this presentation in support of the Tobacco Product Education and Health Protection Act of 1990. I hope that my remarks will, in some small way, further passage of this important legislation.

Officer Bruce R. Talbot

Woodridge Police Department
DARE Program,
One Plaza Drive,
Woodridge, Illinois 60517-4599.
(708) 719-4738.

bt

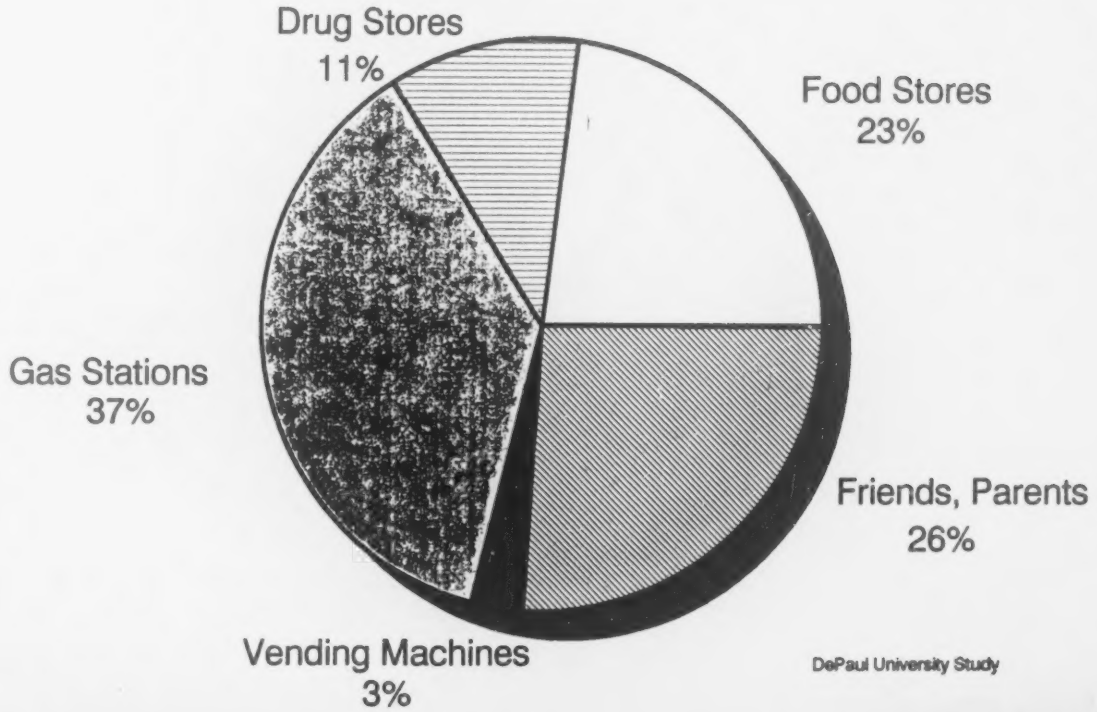
TOBACCO USE BEGINS EARLY



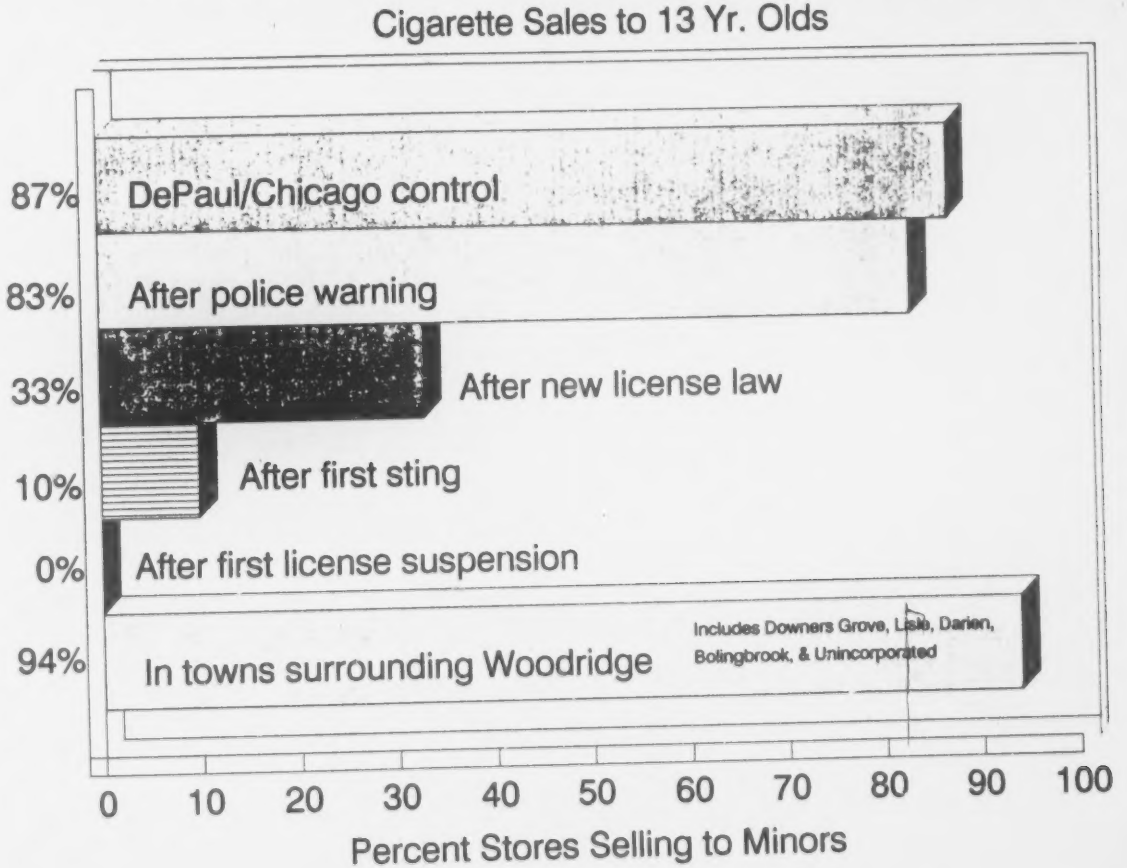
National Institute on Drug Abuse
National Household Survey on Drug Use

SUPPLY OF CIGARETTES TO MINORS

Retail Merchants equal 74%



DePAUL UNIV. & WOODRIDGE PD STUDY



EFFECT OF WOODRIDGE TOBACCO LAW BANNING POSSESSION AND PURCHASE

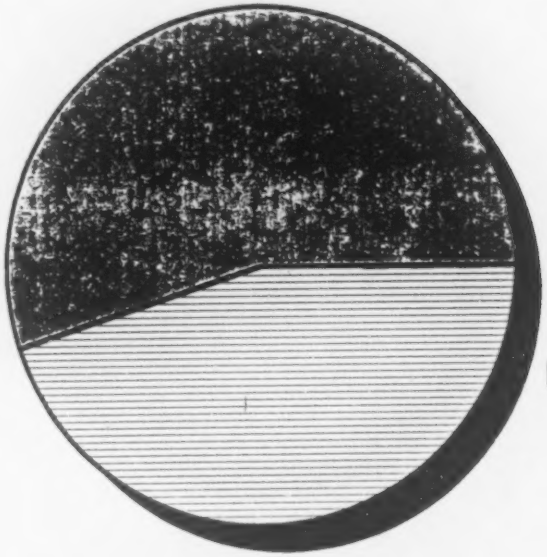
Per Survey given to 650 students in 7 th and 8 th grade

93%	Aware of Law
72%	Help Deter Self
55%	Help Deter Others
16%	Regular Smokers
12 yr.	Average Age Start Smoking
15%	Use Pack a Day
72%	Buy Outside Woodridge

DePaul University Study

CIGARETTES AS "GATEWAY DRUG" OF ADOLESCENT CIGARETTE SMOKERS

Marijuana Users
55%

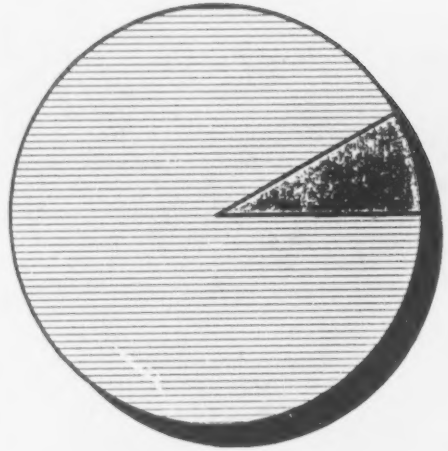


Non-Marijuana Users
45%

National Institute on Drug Abuse
National Household Survey on Drug Use

CIGARETTES AS "GATEWAY DRUG" OF ADOLESCENT MARIJUANA SMOKERS

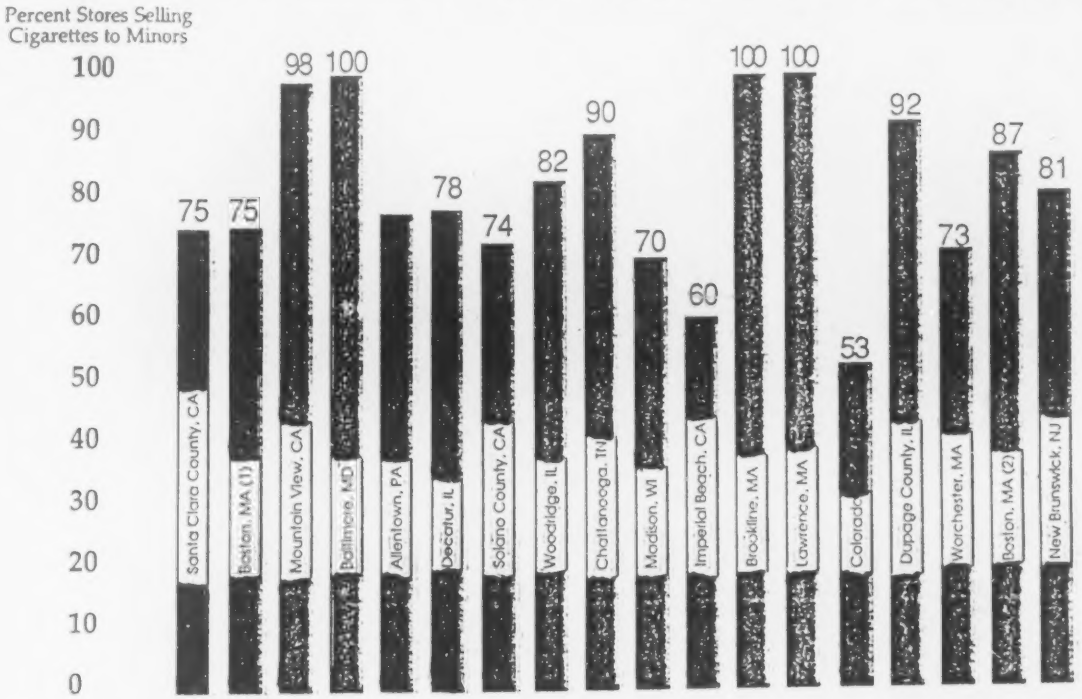
Reg. Cigarette Smokers
92%



Not Reg. Cigarette Users
8%

National Institute on Drug Abuse
National Household Survey on Drug Use

RESULTS OF TRIALS BY MINORS PURCHASING CIGARETTES



In every trial we know of in which minors as young as 11 years old attempted to purchase cigarettes over the counter, they have been successful in an average of three of every four stores tried.

The CHAIRMAN. Mr. Joyce.

Mr. JOYCE. Mr. Chairman, good afternoon.

My name is John Joyce. I am executive director of the Main Grocers Association. Our association is comprised of retail grocers who are doing business throughout the State of Maine. These retailers vary in size from large supermarkets, supermarket chains, to small independently-owned "mom and pop" so-called variety stores.

I am here today representing my retail members.

One of the many functions that we offer as an association is that of lobbying at the State House in Augusta, and also our retail educational programs. And as I said, I am here today on behalf of those members.

We oppose S. 1883. As I will explain, those of us who are directly involved in the retail sales of tobacco products in Maine and throughout Northern New England are tackling the minors issue on our own initiative.

Government intervention—certainly Federal intervention—in our opinion is unnecessary. I will also explain that we have particular difficulty with sections 943 and 955.

I would like to run you through just what happened in the State of Maine last April and May, when we enacted our recent tobacco sales to minors law.

We as an association supported the legislation as it finally came out of committee. That legislation said basically that we would post signs in all the retail establishments that offered cigarette tobacco to the general public.

It was very interesting—there was a financial note attached to the legislation as it came out and went to the appropriations table. The committee chairman of the Business Legislation Committee which was in charge of this particular L.D. came to me later and said, "We have a problem with our bill." By the way, we were part of a coalition of the Maine Lung Association and the Maine Medical Association.

I asked what was the problem. The problem, he said quite candidly, "is we are not going to get funded through appropriations."

I asked, "What is the funding need?"

He said, "We cannot get the money to print the signs."

I said, "You have my word that you can go to the appropriations chairman and strip that appropriations. We will print the signs free-of-charge."

That is our association's reaction to selling tobacco to minors. We do not approve of it. The State laws says you shall not sell or furnish tobacco products to anyone under 18. We will stand behind it. The law passed. We stood behind our word. We printed the signs, and we got them out to every retail grocer in the State of Maine—even those who were not members of our association.

We furnished the signs to every restaurant, every vending machine company, anybody that we knew of who sells cigarettes in the State of Maine. We wanted these notices out. We wanted the general public to know. We wanted the youngsters to know that we are now going to enforce our laws as to minors—again, at no charge.

In our State, the Division of Liquor Enforcement was charged with enforcing this regulation or this new law. We went down and

furnished a supply of signs to each officer in inspection and asked them if they saw a need for having these signs up, to please pass them out.

We placed them in the licensing agencies in the State so that anybody who had just acquired a grocery store would know that there was a sign available free-of-charge and to be used.

We encouraged our members—we told them to put these signs up. They are not dust collectors. We don't want to go into stores and see bills attached to them in the back of a cigarette rack. We want them at the point of sale, and we want the customers to know that this is the law, and as an association we intend to back the law up.

I think we have been very successful. Two weeks ago I had a meeting with the Maine Lung Association, and I was very pleased when the director said, "John, the signs are out there, and they are helping. You have stood behind your word." And that is why I am here today.

I think that this legislation would be a little bit redundant. And it is not only being done in Maine—it is done in New Hampshire and Vermont, who have passed legislation, and they are enforcing it quite similar to what we are doing in Maine.

We think, quite frankly, if the Federal Government does have a little extra money to spend in enforcing programs such as this that we are doing a job in Maine—we do have a $210 million deficit in our State, and we could use any funds that might be made available to help us alleviate that deficit. I am not being sarcastic; I am being sincere with that remark.

I would like to also explain that as an association we conduct many educational programs, and one of those that is probably a highlight is what we call our TAM program, Techniques of Alcohol Management. That is a program that we offer to all our retail members where we train the sales clerks in the proper methods of identifying the illegal sale of alcohol to minors.

Why I bring that up, quite frankly, is we have incorporated Maine's new tobacco law into that program even though our State law is 21 for alcohol and 18 for tobacco. We have these seminars on an average of once a week, going around the State, and we generally have good attendance at these things, because a person who takes this course and completes the testing is considered an approved server of alcohol in Maine.

So we are taking off—we are not just letting something lie dormant—we are saying there is a law, and we are trying to enforce it, we are trying to support the law because we do support the idea behind the law.

I do have a problem, obviously, representing grocers, when I read a piece of legislation and I see words that refer to a seizure, forfeiture, penalties, penalties over and above what the Federal/State penalties are—and by the way, the law in the State of Maine for anybody selling cigarettes to a minor, the fine is between $100 and $1,000 per store, and for every clerk involved is between $10 and $100 per instance.

If you have any questions, I will certainly attempt to answer them later on, Senator. Thank you for the opportunity to present at least our part of the story to your committee today.

The CHAIRMAN. Thank you. I'll come back to some other questions, but do you know how many times that has been enforced in Maine, how many penalties or convictions there have been?

Mr. JOYCE. Senator, by agreement—I can't say by agreement—I have talked with the chief of the Liquor Enforcement Division, who is charged with enforcing this law, and he has directed his staff—this became law I believe the first of October of last year—he directed his staff to go out and ensure all the signs were in place and to kind of back up what we had been preaching to the stores, that we are going to get the signs in place, we'll give you 6 months, and then we're going to start enforcing the law. To this date, Senator, to answer your question directly, I don't know.

The CHAIRMAN. OK. Thank you.

[The prepared statement of Mr. Joyce follows:]

Serving the retail grocers of Maine
5 Wade Street P.O. Box 5460 Augusta ME 04330 • 207-822-4461

Testimony of

John J. Joyce
Executive Director

MAINE GROCERS ASSOCIATION

before the
Committee on Labor and Human Resources
United States Senate

April 3, 1990

Mr. Chairman and Members of the Committee. My name is John Joyce. I am Executive Director of the Maine Grocers Association ("the Grocers"), a position I have held since 1986. I also am a member of the Food Marketing Institute Association and in 1989 received the Spirit of America Award from the National Grocers Association. The Grocers represent more than 2,000 grocers statewide, ranging from the neighborhood grocery and convenience stores and the traditional Maine country store to the largest and most modern retail establishments.

We oppose S. 1883. As I will explain, those of us who are directly involved in the retail sales of tobacco products in Maine and throughout New England are tackling the "minors" issue on our own initiative. Government

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intervention -- certainly federal intervention -- is unnecessary. As I also will explain, we have particular difficulty with Sections 943 and Section 955.

1. Under my leadership, the Grocers have developed an extensive program to educate our members and other Maine retailers about our state's minimum sales age act. Since 1987, the Grocers have provided, free of charge, signs, door decals and register cards reminding customers, store owners and clerks that tobacco sales to those under the age of 18 are prohibited. Although state law required the state to print and distribute these materials, the Legislature never appropriated the necesary funds. The Grocers agreed to print and distribute these materials at our own expense. Copies of these materials are attached.

In addition to printing and distributing such point-of-purchase materials, the Grocers have developed and presented informational materials at its annual trade shows and conventions. Owner/operators and managers of retail stores are provided with information about the importance of adhering to the state's minimum sales age laws. This information is presented both orally and in written form in the various seminars and meetings of the association.

Unlike most trade associations, the Grocers have agreed to provide information and materials even to non-

members. This is because the Grocers recognize the importance of preventing tobacco sales to minors. The Grocers make their materials available to non-member grocers and members of the hospitality and general business community that may sell tobacco products as a service to their employees or customers.

Activities similar to those of the Maine Grocers Association also are part of the programs of the New Hampshire Retail Grocers Association and the Vermont Retail Grocers Association. In both of these neighboring northern New England states, these organizations have supported 18-year-old minimum sales age laws and modifications to their state statutes that would make it more difficult for minors to buy or receive tobacco products.

In fact, the Vermont Grocers Association, in conjunction with other state trade associations, sponsored sweeping legislation designed to keep tobacco products out of the hands of minors during the 1990 session of the legislature. This introduction followed a two-year effort mounted in consultation with the state Department of Public Health and members of the House Health and Welfare Committees.

In sum, S. 1883 is unnecessary insofar as it would inject more government -- and the federal government, at that -- into the issue of tobacco sales to minors.

We note, in this connection, that Section 920 in the bill would specifically encourage states to prohibit the sale of tobacco to persons under 18 but not to prohibit the purchase of tobacco by persons under 18. This seems to us an incomprehensible omission. Minors are subject to severe penalties for purchasing alcoholic beverages and likewise should be held responsible for purchasing or attempting to purchase tobacco products in violation of state law. New Hampshire, for example, enacted such a prohibition in 1987 and the proposed minors legislation in Vermont also includes such a prohibition.

2. We particularly oppose Sections 943 and 955. Section 943(a)(2)(A) would allow the Secretary of Health and Human Services to impose a "temporary ban" on the shipment of tobacco products to a retailer found by a federal court to have "engaged in a pattern or practice of sales to minors" in violation of the law of a state selected as a "model state" under Section 920. It also would allow the Secretary to seize "the tobacco products of such retailer." How long such a ban might continue is not specified. Apparently the retailer's entire inventory of tobacco products could be seized and ordered destroyed pursuant to Section 943(c). This would be <u>in addition</u> to the penalties prescribed by state law for illegal tobacco sales to minors!

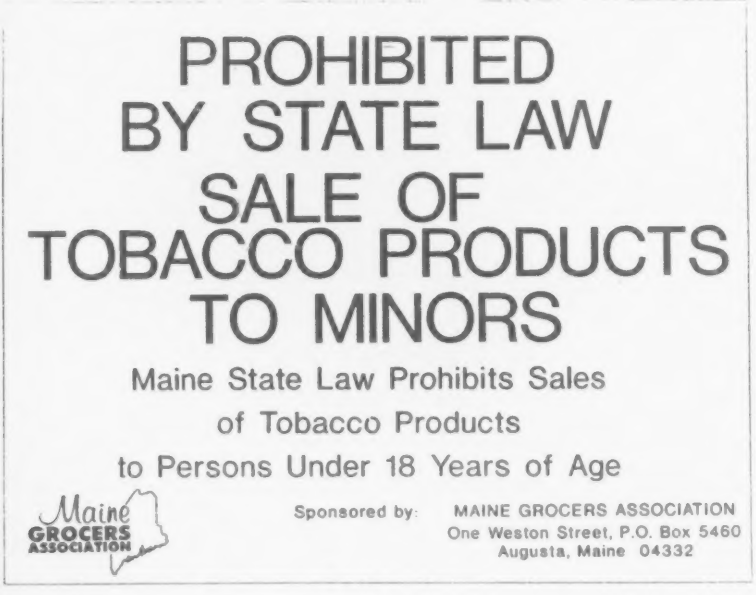
Moreover, there is no indication in the bill as introduced whether a "retailer" is a single store or could be a chain of stores; whether all stores in a chain could be held responsible for the conduct of a single store in the chain; whether one illegal tobacco sale in each of ten stores in a chain, over a several-year period, would be deemed a "pattern or practice of sale to minors" supporting a ban on tobacco shipments to the entire chain; and whether the conduct of stores in the chain outside of the model state would be considered -- either for or against finding a "pattern or practice" of illegal sales to minors.

Section 943(a)(2)(E) would allow the Secretary to assess "additional penalties or impose a further forfeiture" on the retailer, without specifying what those penalties might be or just what other property of the retailer might be required to forfeit. Finally, Section 943(c) would authorize a court to order the destruction of tobacco products seized from a retailer -- even though it is the conduct of the retailer, and nothing about the products themselves, that gave rise to the seizure. Section 943 would appear to permit the seizure and destruction of a retailer's entire tobacco inventory on the basis of sales to minors, even if made in good faith.

Section 955 would provide that nothing in S. 1883, the Federal Cigarette Labeling and Advertising Act

or the Comprehensive Smokeless Tobacco Health Education Act shall prevent state or local governments from enacting "additional restrictions" on the advertising, promotion, sale or distribution of tobacco products to persons under 18. I do not hold a degree in psychology, but knowing the antitobacco crusaders in my state as well as I do, I have no doubt that this provision would be seized upon to justify the worst forms of harassment legislation -- in the name of "protecting" minors. Our members do not need such harassment, and Congress should not encourage it.

I would be glad to answer your questions.



The CHAIRMAN. Mr. Strauss.

Mr. STRAUSS. Thank you, Mr. Chairman.

My name is Peter Strauss. I am president and chief executive officer of Metropolitan Distribution Services in New York, and also president of the National Association of Tobacco Distributors.

Our membership covers all 50 States, and our members market goods with an annual wholesale value of over $16 billion including, in addition to tobacco products, confectionery, health and beauty aids, groceries, beverages, and a variety of sundry products.

Mr. Chairman, NATD opposes S. 1883. We agree unequivocally that tobacco should not be sold to persons below the minimum legal age. Tobacco Distributors play an important role in reinforcing retailer efforts to comply with State laws prohibiting tobacco sales to minors.

We oppose S. 1883 not only for the reasons stated already by other witnesses, but because of our particular concern about the two provisions that would affect us as tobacco distributors directly—that is, sections 943 and 955.

Section 943 would establish seizure and disposal procedures for tobacco products similar to those already in place for adulterated and misbrand food, drug or cosmetic products under the Food, Drug and Cosmetic Act. But section 943 goes even further to authorize seizure and disposal of tobacco products destined for or held by a retailer found to have "engaged in a pattern or practice of sale to minors" in violation of the laws of a "model State".

This provision would function as a Federal civil penalty imposed on a retailer for a pattern or practice of violating a State criminal law upon a Federal court's determination in a civil proceeding that the State's law had been violated. This would be a dangerous and unwarranted extension of Federal power. The responsibility for enforcing State laws prohibiting tobacco sales to minors belongs with the States, not with the Federal Government.

Section 943 does not, and indeed could not, specify the tobacco products to be seized from a distributor. The provision for such seizure is fundamentally misconceived because it is not the tobacco products that present the problem. An adulterated or misbrand article can be identified for seizure, but when the problem is the conduct of a distributor in violating a ban on shipments to a retailer or the conduct of a retailer in selling tobacco products to the wrong customers, there is no basis for identifying the products to be seized.

Moreover, section 943 places no limit on the "additional penalties" that may be imposed on a distributor who violates the ban or on the nature or extent of the property subject to "further forfeiture".

Section 943 bizarrely applies the "disposal" procedures of the FD&C Act, which are designed for articles seized because they are found to be adulterated or misbrand, to tobacco products seized from a distributor because a retailer is selling such products to the wrong customers.

Section 943 would authorize a court to order the tobacco products seized from a distributor to be destroyed, even though there is nothing defective about the products themselves—they are neither adulterated nor misbrand.

Alternatively, section 943 would authorize a court to order the products to be returned to the distributor to be "brought into compliance with the provisions of this title", even though the products themselves are already in compliance with the provisions of Title IX. These disposal provisions make no sense in the context of tobacco products that are seized because a retailer has sold such products to minors.

Regarding section 955, Mr. Chairman, we frankly do not understand the purpose of section 955. Congress, long ago, made clear that the Federal Cigarette Labeling and Advertising Act does not affect the power of any State to restrict the sale of cigarettes to minors. However, section 955 could provide license for virtually any restriction on the sale or distribution as well as the advertising and promotion of tobacco products, however extreme, so long as the asserted justification for the restriction is to prevent access to tobacco products by persons under 18.

It is our understanding that S. 1883 is not designed to bring about a ban on the sale or distribution of tobacco products. But section 955 inevitably would be exploited to send the Nation down that prohibitionist road.

Moreover, allowing State or local restrictions on cigarette advertising and promotion would impose a major unjustifiable cost on distributors, who in many cases provide point of sale material. Many distributors services multi-state markets, and virtually all distributors service many different local jurisdictions. Giving license to such jurisdiction to promulgate its own restrictions imposes unwarranted costs on an already low-margin business.

The two sections of S. 1883 on which I have focused deal unfairly and illogically with the distributor's function in our economy.

I thank you for this opportunity to present our views.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Strauss follows:]

strauss 5

NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS

NATD

Chairman of the Board
Claire Arnold
Newton Carson Corporation
Atlanta, Georgia

President
Peter Strauss
Metropolitan Distribution Services
New York, New York

Vice President - Finance
Lee Silverman
Rollers, Inc.
New Castle, Pennsylvania

Secretary
William Tobie
Ehr Brown Company
Aurora, Illinois

Executive Vice President
Terry J. Burns
NATD
Alexandria, Virginia

Statement of

PETER STRAUSS, PRESIDENT
NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS

before the

Committee on Labor and Human Resources
United States Senate

April 3, 1990

Mr. Chairman and Members of the Committee. My name is Peter Strauss. I am President and Chief Executive Officer of Metropolitan Distribution Services, Inc., Flushing, New York. I am also the President of the National Association of Tobacco Distributors (NATD) and a member of its Board of Directors. NATD represents over 570 corporate wholesaler-distributor members with over 740 distribution outlets, as well as 230 manufacturer and supplier associates whose 12,000 salesmen canvass and supply almost 1.5 million retail outlets selling tobacco products. The membership of NATD covers all 50 states and our members market goods with an annual wholesale value of over $16.0 billion. We account for 55 percent of the tobacco products distributed to retail outlets in the United States, with the manufacturers accounting for the balance.

Mr. Chairman, NATD opposes S. 1883. We agree, emphatically, that tobacco should not be sold to persons below the minimum legal age in any given jurisdiction, and we believe that tobacco distributors can play an important role in reinforcing retailer efforts to comply with state laws prohibiting tobacco sales to minors. Indeed, NATD currently is preparing a program to assist retailers in this regard. But we oppose S. 1883, and not only for the reasons stated already by other witnesses. Of particular concern to our members are two provisions that would affect tobacco distributors directly -- Section 943 and Section 955. I will address each in turn.

1. Section 943

Section 943, entitled "Seizure," is adapted from Section 304 of the Federal Food, Drug, and Cosmetic ("FD&C") Act, 21 U.S.C. § 334. Under Section 304, a food, drug or cosmetic that is adulterated or misbranded may be proceeded against on libel and condemned in any district court in the United States in which the article is found. Section 304(a). The article proceeded against can be seized pursuant to the libel. Section 304(b). Any condemned article can be disposed of by destruction or sale as the court may order. Section 304(d). The court may order the article to be delivered to the owner to be destroyed or brought into compliance with the provisions of the FD&C Act. *Id.*

Section 943 would establish similar seizure and disposal procedures in the case of any tobacco product that is "adulterated" or "misbranded," as those terms are defined in Section 952 and Section 951, respectively. But Section 943 would do more. It would authorize seizure of tobacco products destined for or held by a retailer found to have "engaged in a pattern or practice of sale to minors" in violation of the laws of a state designated as a "model state" under Section 920. In addition, it would authorize the "disposal" of tobacco products seized on this basis. Section 943(a)(2), (c).

Section 943(a)(2). Under this provision, the Secretary of Health and Human Services could, among other things, place a "temporary ban" on the shipment of tobacco products to a retailer (Section 943(a)(2)(A)) and could seize "such products" from distributors that violate the ban (Section 943(a)(2)(B)). He also could "assess additional penalties or impose a further forfeiture" on a "penalized . . . distributor" for violating the ban on shipping tobacco products to a particular retailer. Section 943(a)(2)(E).

Section 943(a)(2)(A) does not say how long the "temporary ban" could be continued or what the conditions would be for ending it. More substantively, the ban would function as a federal civil penalty imposed on a retailer for a "pattern or practice" of violating state criminal law,

upon a federal court's determination, in a civil proceeding, that the state's criminal law had been violated. This would be a dangerous and unwarranted extension of federal power. The responsibility for enforcing state laws prohibiting tobacco sales to minors belongs with the states, not with the federal government.

Section 943(a)(2)(B) does not -- and, indeed, could not -- specify the tobacco products to be seized from a distributor who violated a "temporary ban." The provision for such seizure is fundamentally misconceived because it is not the tobacco products that present the problem under Section 943(a)(2), as it is in the case of adulteration or misbranding under Section 943(a)(1). An adulterated or misbranded article can be identified for seizure. When the problem is the conduct of a distributor in violating a ban on shipments to a retailer, there is no basis for identifying the products to be seized. Section 943(a)(2)(E) places no limit on the "additional penalties" that may be imposed on a distributor who violates the ban or on the nature or extent of the property subject to "further forfeiture."

Section 943(c). This provision bizarrely applies the "disposal" procedures of Section 304(d) of the FD&C Act, which are designed for articles seized because they are found to be adulterated or misbranded, to tobacco products seized from a distributor because a retailer is selling such

products to the wrong customers. Section 943(c)(1) would authorize a court to order the tobacco products seized from a distributor to be destroyed, even though there is nothing defective about the products themselves (*i.e.*, they are neither adulterated nor misbranded). Alternatively, Section 943(c)(2)(B) would authorize a court to order the products to be returned to the distributor to be "brought into compliance with the provisions of this title," even though the products themselves already are in compliance with the provisions of Title IX. These disposal provisions make no sense in the context of tobacco products that are seized because a retailer has sold such product to minors.

2. Section 955.

Section 955 provides, in part, as follows:

> "Nothing in this subtitle, section 5 of the Federal Cigarette Labeling and Advertising Act . . . or the Comprehensive Smokeless Tobacco Health Education Act . . . shall prevent and State or local government from enacting additional restrictions on the advertising, promotion, sale, or distribution of tobacco products to persons under the age of 18."

Mr. Chairman, we frankly do not understand the purpose of this provision. Congress long ago made clear that the Federal Cigarette Labeling and Advertising Act does not affect the the power of any state to restrict the sale of cigarettes to minors. *See* S. Rep. No. 566, 91st Cong., 1st Sess. 12 (1969). It is fair to assume, however, that

some antismoking advocates would portray Section 955 as a license for virtually any restriction on the sale or distribution (as well as the advertising and promotion) of tobacco products -- however severe or extreme -- so long as the asserted justification for the restriction is to prevent access to tobacco products by persons under 18.

It is our understanding that S. 1883 is not designed to bring about a ban on the sale or distribution of tobacco products. The portion of Section 955 that I have quoted inevitably would be exploited to send the nation down that prohibitionist road.

I would be glad to answer any questions.

The CHAIRMAN. Let me go back to Officer Talbot. The way this is actually structured, 10 to 20 States have to voluntarily make the decision to pursue this, and to improve enforcement.

To enforce the law on sale to minors, we operate mainly at the State level, and let me just review the way that it proceeds. A State would make a finding that a particular merchant had a pattern of selling to minors, and where such a finding had been made and a notice sent, unless there was a change in the pattern, the State would notify the merchant that they would be barred from receiving tobacco products for up to 60 days. The distributor would also be notified. Then, if the distributor did not comply with the penalty, and if the State requested Federal assistance, he might face the limited seizure of tobacco products.

Do you believe that that is an unduly onerous penalty?

Mr. TALBOT. Not at all, Senator. It is my opinion that the only thing that will force merchant compliance with age restrictions is to remove their ability to merchandise that product.

We had one merchant who was given a one-day license suspension and fined $400. He said, "I don't care about the $400 fine. I sell between $200 and $300 worth of cigarettes a day. What kills me is when my customers come into the gas station to buy a pack of Marlboros or Camels, and I have to say,' I'm sorry, the city has revoked my license today; I cannot sell,' and then to watch that customer get in his car and drive across the street to the Mobil station"—his competitor—"and buy." That is what I believe has given us 100 percent compliance.

If you just issue a fine, if you don't stop the merchandising, I don't feel that the law will be effective.

The CHAIRMAN. Could you give us a brief description of the vending machine lockout device? Could you tell us a little bit about that?

Mr. TALBOT. In the industry they are referred to as a "Utah remote". Very simply, all they do is kill the electricity to the vending machine, and that is connected with a small doorbell-type buzzer. The merchant can locate it wherever it is convenient for him behind the counter. When a customer comes up to operate a vending machine, an employee visually identifies that it is obviously an adult, pushes the button and buzzes the machine into operation. We have had no instances of minors able to buy after those devices were placed on the machines. Before, we had 100 percent sales out of every vending machine.

The CHAIRMAN. The argument made by the industry is that the ads don't influence kids' decisions to buy the tobacco products. They say it is all peer pressure and parental influence. What is your reaction?

Mr. TALBOT. What I have found is that advertising of cigarettes is very important to children, that they watch it very carefully, and that they are extremely brand-conscious. The children in our junior high school, age 13, specifically like Camels and Marlboros. The reason why they like Camels and Marlboros is because of the Camel cartoon—"Smooth Joe", they call him—the kids are getting these Camel cigarette T-shirts through the mail; they wear them into school. The schools finally had to place a T-shirt ban that advertises drugs to eliminate this.

If a brand and advertising were of no concern to the children, they would just go in and buy generic cigarettes, the cheapest. But they don't—they are very brand-conscious, and I think only advertising accounts for that.

The CHAIRMAN. Mr. Joyce, I want to commend you and your association for the efforts that you have made in terms of the education and the initiatives which you and the association have launched. We are really looking around to find out what can be effective, and you have certainly demonstrated that your association wants to deal with that problem.

You have heard Officer Talbot give his comments. We have had a recent study in Boston attempting to learn how well the laws prohibiting sales to minors are being enforced. Eleven year-olds were sent into retail stores to buy cigarettes, and of the 75 who tried to purchase the cigarettes, 75 were successful. So clearly we have got to do something about the effectiveness of the laws. Maybe if they saw the kinds of signs that are going to be available in Maine that would not be so.

Don't you think we need—and I guess I know the answer to your question—something more than just these kinds of signs, these kinds of educational efforts that you have outlined?

Mr. JOYCE. Mr. Chairman, first of all, we felt the signs needed to be a strong statement, and that was the reason—we wanted to bring the whole community—and when I say the "community", I'm talking about the retailer, the clerk and the potential purchaser, and also their parents—bring them in line to know that this is the law, and the State is going to get serious about it.

So we think it is very important that you make that statement and make it an enforceable statement. And we basically say, frankly, as an association that if we have got people out there selling cigarettes to minors, we can enforce the law.

I would like to elaborate just a second. In the Liquor Division, I was talking with the chief and I asked him how many violations he would have, for example, on alcohol, and he said about 2 percent of the merchants are flagrant violators of alcohol sales to minors. I assume tobacco is more than that, but I think the flagrant violators are not as bad as people might think.

I would say where we feel we are successful—the most frequent comment I am getting back from retailers is the traditional, "Does that also apply to the note that the mother or father sent with the child to buy the cigarettes?"—and yes, that does. That note means nothing anymore. You will be fined if you go by that note.

The CHAIRMAN. Well, the seizure provision is not really aimed at the retail establishment. It is only applicable to the distributor, and in the revised version of the bill I think that is clarified. Hopefully, the seizure provision will not be used, but it has the clout that we think might be essential in order to make it work.

Mr. Strauss, are you aware that, either through ignorance of disregard, State law is routinely disregarded in virtually every State where you have the various prohibitions?

Mr. STRAUSS. I am aware of the State laws. I am not aware of the comparative disregard of them. I don't think that means there is anything wrong with the laws.

The CHAIRMAN. Well, Officer Talbot gave an example of one particular community which I thought effectively made this a priority, and told us what his results have been. Maybe that is the only community where that has happened, but we certainly have other studies that have been conducted in a number of other States.

I have here about 15 different tests. We will give you an opportunity to review them and come back and give your evaluation of them, but they demonstrate very clearly that in every trial we know in which minors as young as 11 years old have attempted to purchase cigarettes over-the-counter, they have been successful in an average of three out of every four stores tried. This isn't really new information to you. It is information that is generally available, and I am sure you have been asked before whether your industry association has information to the contrary.

Mr. STRAUSS. No, but I think Officer Talbot demonstrates what a local community can do on the issue of sale to minors if there is a desire to do so.

The CHAIRMAN. Well, he has talked about what has happened and what his community has been able to do and then what happens a block further once outside that jurisdiction. That's the way I heard his testimony. That is what they have been able to do after I think absolutely extraordinary leadership by the officer and also by those in the community, and in spite of very extraordinary efforts, they are still limited in their effectiveness because just beyond that jurisdiction we find that those efforts are being ignored. That is part of the testimony that he gave.

Mr. STRAUSS. What is able to be done in one community should be able to be done in others.

The CHAIRMAN. Well, if it is able to be done in the community, then why not permit it to be done in the State?

Mr. STRAUSS. The State is capable of doing that. They have laws prohibiting sale to minors.

The CHAIRMAN. And they have demonstrated it—unless you have some other material—to be woefully inadequate and ineffective. That is what the problem is. If you've got other information—and we are giving you the chance—to demonstrate that they are effective and they are doing it, then we don't need this legislation. But we ask you to comment on the various studies that demonstrate that they are being circumvented and are not effective.

And regarding cost of the bill, I mean, we are spending over $20 billion a year on the direct health impact of the abuse of tobacco products. not to mention as the officer has talked about, and which we haven't gotten into here, the concern that leaders in the field of substance abuse have about "gateway" drug problem, which is one of enormous importance and significance.

So we are just giving you an opportunity to demonstrate that either our information isn't correct or that what exists at the State level is effective. Otherwise, one has to conclude that you haven't got that information; and that what we are ascertaining is correct, and we ought to have the opportunity, if the Congress feels it is important, to address it.

Mr. STRAUSS. Senator, I am not competent to comment on why States are not enforcing the existing laws. I came here to testify to the fact that S. 1883 is illogical and unfair in terms of the seizure

and disposal provisions as far as the distributors are concerned because if one of my customers is selling in contravention to State law to a minor, and I am informed about that, I will not distribute to him; but if, for example, I am not informed, and then——

The CHAIRMAN. Well, have you stopped any distribution, to your knowledge, to any retailers?

Mr. STRAUSS. I have stopped distribution to retailers who have contravened other laws.

The CHAIRMAN. But with regard to violating the State laws or ordinances.

Mr. STRAUSS. State laws, yes, but not with respect to minors, because I was never informed that any was.

The CHAIRMAN. Well, on the violation of just State laws but not to minors, can you provide a list for us?

Mr. STRAUSS. On State laws relative to minimum pricing, rebating, or selling below minimum prices.

The CHAIRMAN. Well, no, that isn't what we are talking about here. We aren't talking about minimum pricing or collusion or other kinds of factors. We are basically talking about where we've got a number of State laws and a number of ordinances, and whether you can demonstrate from any of your activity that you have cut any of these distributors off. That is what I am asking, and as I understand, your answer is no, that it has not been brought to your attention. Is that a fair conclusion?

Mr. STRAUSS. If the State would inform me and my company that I am servicing a retailer that is contravening State law, I would not service that retailer.

The CHAIRMAN. Well, the provisions in here on enforcement are meant to be effective, and we are glad to work with you—we are committed to having effective remedies available. Otherwise, I think at least I have seen to many pieces of legislation that are meaningless without that. But we would be glad to work with you, Mr. Strauss, and also with you, Mr. Joyce, in that area. I am sure you have some suggestions that may very well be useful.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Officer Talbot, I am very pleased to have a witness from Illinois here. If I may, let me ask you how did you get involved in this whole cigarette education thing?

Mr. TALBOT. Well, Senator, I wish I could tell you that it was planned; it wasn't. I was in our school system, doing a 17-week drug prevention program, and I began to receive complaints—complaints from the school, the teachers, the principal, the parents, and even the children themselves—that as children were coming to and from school, they were buying cigarettes from merchants.

I tried to solve the problem by working with the merchants, by informing them of the complaints, by trying to get voluntary compliance. However, when we conducted our study with DePaul University, we found that our efforts to work with the merchants, to get voluntary compliance of our State age restriction, were unsuccessful; 83 percent of our merchants continued to sell after a written police warning. It wasn't until we had a license law that stopped the merchandising of the product that we got compliance.

Senator SIMON. You are working a great deal with young people—and this is not part of this bill—but what would happen to teenage consumption of cigarettes if we were to increase the cost 10 cents a pack?

Mr. TALBOT. It would go down dramatically. There have been several studies that show that when you raise excise tax on cigarettes, the amount of use among young people goes down. Young people are very cost-conscious.

We found in our study with DePaul University that the vast majority of children buy at gas stations. They buy at gas stations even though they cannot drive into the gas station, because they are not old enough to have a license, but they buy at gas stations because they are the cheapest. The least frequent place they buy it is liquor stores and vending machines because they are the most expensive.

Children have a limited amount of resources. If you can raise the excise tax to children, a significant portion will stop buying.

Senator SIMON. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you all very much.

Senator SIMON [presiding]. Our next panel includes Dr. Gary Williams, director of the American Health Foundation, and John Rupp, from Covington & Burling.

We are pleased to have both of you here. We will enter your full statements in the record, and we would ask you to confine your oral statements to 5 minutes, plus questioning.

Dr. Williams, we will start with you.

STATEMENTS OF DR. GARY WILLIAMS, DIRECTOR, AMERICAN HEALTH FOUNDATION, VALHALLA, NY; AND JOHN RUPP, COVINGTON & BURLING, WASHINGTON, DC, REPRESENTING THE TOBACCO INSTITUTE

Dr. WILLIAMS. Thank you, Senator Simon.

In response to an invitation from the staff of Senator Kennedy's office to comment on these deliberations, I coordinated a review by the scientists of the American Health Foundation of the current knowledge of the adverse effects of tobacco additives. Our comments in final form were submitted on March 30.

Briefly, we find that a wide variety of additives are in use for this purpose. Part of our information comes from research sponsored by the National Cancer Institute, specifically directed toward isolating and identifying additives in tobacco products.

As a consequence of this effort and repeatedly reviewing the available scientific literature, we find that there is not a database attesting to the safety of these additives under the conditions of intended use. And I have to emphasize here "intended use", because these are substances that are added to a product that is intended to be burned and inhaled, and the testing of additives in other contexts does not provide assurance of safety in this type of situation.

Among the additives in use are a number that raise concerns, and I have identified examples of these in my written testimony, and I will not repeat it here.

Accordingly, we arrive at the conclusion that appropriate safety testing is necessary for these additives.

Thank you.
Senator SIMON. We thank you.
[The prepared statement of Dr. Williams follows:]

PREPARED STATEMENT OF THE AMERICAN HEALTH FOUNDATION

Research at the American Health Foundation has long been directed at understanding the health effects of tobacco products. Our assessment is that cigarette smoking is the major established cause of cancer of the lung and respiratory tract in the United states and in most parts of the world. Smoking also contributes to the occurrence of cancer in the pancreas, kidneys, bladder and cervix, and also to leukemia. Smoking and drinking are associated with head and neck cancer. Potent carcinogens and cancer enhancing agents have been identified in tobacco smoke (Wynder and Hoffmann, 1967; Hoffmann and Hecht, 1990). In comparison, relatively little is known about the role of flavor additives.

Scientists at the American Health Foundation have reviewed the list of tobacco additives in the 1988 report of the Independent Scientific Committee on Smoking and Health. For the great majority of agents on this list, we have no knowledge of adverse health effects. Nevertheless, some of the agents arouse concern. These are as follows:

Amino Acids. Several natural amino acids, such as alanine, arginine, leucine, and phenylalanine, are commonly added to cigarette tobacco. Some amino acids are known to give rise to amino heterocyclic compounds during heating (Sugimura, 1985). These compounds are powerful genotoxic agents and several are experimental carcinogens (Sugimura, 1985), one of them, IQ, inducing liver cancer in nonhuman primates extraordinarily rapidly (Adamson et al., 1990).

Aldehydes A number of aldehydes and related carbonyl compounds, such as glyoxal, acetaldehyde, 2-hexenal, and furfuraldehyde are volatile, and therefore likely to be in the smoke. These may be cytotoxic or genotoxic, and thus present a hazard; the carcinogenic activities of acetaldeyde and glyoxal have been demonstrated.

Plant extracts In addition to the use of tobacco extracts and fractions thereof, plant extracts and their fractions have been used as flavoring agents. For example, licorice root extract contains up to 25% glycyrrhizin, a compound which gives rise to carcinogenic aromatic hydrocarbons during burning. Other plant extracts being used as flavor additives may contain or may form toxic or carcinogenic agents during smoking.

Furocoumarins. Two oils, angelica and Bergamot, contain furocoumarins, angelicin and 5-methoxypsoralin, respectively. Both furocoumarins can be photoactivated to DNA-damaging reactants (Papadopoulo and Averbeck, 1985). In conjunction with solar-simulated radiation, 5-methoxypsoralin has been judged by a working group of the International Agency for Research on Cancer (1986) to be an experimental carcinogen and there was limited evidence for angelicin.

Benzyl acetate is used flavoring agent and also occurs naturally in plants, which are used as additives, such as apples, jasmine and ylang-ylang. In 1986, the National Toxicology Program (1986) reported that for male and female mice there was some evidence of carcinogenicity in that benzyl acetate caused increased incidences of liver and forestomach tumors.

Methyl salicylate when given orally or topically to Syrian golden hamsters and rats is teratogenic (Overman and White, 1983).

Menthol is an inducer of enzymes (Madyastha and Srivatsan, 1988) and thus may accelerate the metabolic activation of tobacco carcinogens.

Formation of Benzene. Cigarette smokers have an increased risk of leukemia (Hoffmann et al., 1989; McLaughlin et al., 1989). One of the leukemogenic agents in cigarette smoke (10-70 ug/cigarette; IARC, 1982) is benzene. Since many tobacco additives are known to give rise to benzene during smoking (Higman et al., 1974), the effect of flavor additives on the smoke yield of benzene requires investigation.

Conclusion

In 1975, the "First Report: Tobacco Substitutes and Additives in Tobacco Products" by the Independent Scientific Committee on Smoking and Health (United Kingdom) dealt with a review of additives that are Generally Recognized As Safe (USA -GRAS list). The compounds under review were mainly known food additives. We maintain that the criteria for GRAS food additives are not sufficient for the evaluation of additives used in tobacco, since combustion of such compounds may yield potentially toxic, mutagenic, carcinogenic or cocarcinogenic compounds in the smokestream. The example of pyrolysis of amino acids illustrates why the fate of additives during smoking has to be known in order to be certain that an additive will not increase the toxicity and/or carcinogenicity of tobacco smoke. The fact that many additives are present in commercial smoke products only in small concentrations than (less than 0.1%) does not rule out the possiblity that their combustion may yield a potent carcinogen in the smokestream, the effect of which would be added to the already potent action of the known hazardous products in smoke.

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Senator SIMON. Mr. John Rupp, with Covington & Burling.

Mr. RUPP. Thank you, Senator Simon.

Senator, my partner Richard Kingham was originally invited to address the committee today. He was called out-of-town on an emergency. With your indulgence, I'd like to ask that Mr. Kingham's prepared statement be included in the record of the hearing.

Senator SIMON. It will be entered in the record.

[The prepared statement of Mr. Richard F. Kingham follows:]

Statement of Richard F. Kingham

on behalf of

The Tobacco Institute

before the

Committee on Labor and Human Resources

United States Senate

April 3, 1990

My name is Richard F. Kingham. I am a partner in the law firm of Covington & Burling, where I have practiced in the area of food and drug law for more than sixteen years. During this time, I have represented clients in numerous formal and informal proceedings involving foods, drugs and other consumer products before the Food and Drug Administration (FDA) and other federal agencies.

My statement, which is submitted on behalf of The Tobacco Institute, addresses those provisions of S. 1883 that would transfer authority to review and regulate tobacco additives and require public disclosure of such additives. These proposed statutory changes are unnecessary and counterproductive. In 1984, Congress established a procedure ensuring an orderly review of tobacco additives. That process is well underway. It would make little sense to supplant it in favor of a costly new approach for which no need has been shown.

Based on my experience in food and drug law, I also would like to discuss a suggestion that has been made to vest the responsibilities for review and regulation of additives in FDA. Since FDA lacks adequate resources to fulfill its existing mandate, it would be unwise to enact this bill on the understanding that FDA also would carry out the complex functions relating to tobacco additives that are envisioned. Finally, I will discuss the labeling requirements administered by FDA which, unlike S. 1883, protect manufacturers from the disclosure of trade secrets, such as the identity of flavors.

Review and Regulation of Additives

Section 901 of S. 1883 would establish a new Center for Tobacco Products within the Centers for Disease Control (CDC) that would be directed, among other things, to review and regulate tobacco additives. Under section 902(a)(1), the Center would be required to conduct a detailed review of all additives in tobacco products and to determine whether any additives present significant health risks to consumers of such products.

These provisions are unnecessary because they essentially duplicate an additive review program established by Congress in 1984. In that year, Congress enacted the Comprehensive Smoking Education Act, which requires cigarette manufacturers to provide the Secretary of Health and Human Services with an annual "list of the ingredients added to tobacco in the manufacture of cigarettes." 15 U.S.C.

§ 1335a(a). The manufacturers have complied with that statutory requirement, with the most recent list having been submitted last December. The Secretary, in turn, has been directed to submit periodic reports to Congress concerning any additive that the Secretary believes "poses a health risk to cigarette smokers." 15 U.S.C. § 1335a(b)(1)(B).

The Department is actively reviewing the ingredient lists that have been submitted, and the manufacturers have offered to make their scientists available to assist in that review. To date, the Department has given no indication that the review has created any basis for concern. If the Secretary concludes that any additive does present a cause for concern, he undoubtedly will so inform Congress as well as the cigarette manufacturers.

This review should be allowed to be completed. If in the course of the review concerns develop with respect to any additive, Congress can then consider whether additional legislative authority is necessary. It would be not only premature but also wasteful and counterproductive to initiate a new review at the present time and to include regulatory authority for which no showing of need has been made.

This conclusion has been confirmed by the Secretary of Health and Human Services, Louis W. Sullivan, who of course personally has been active with respect to tobacco issues. In his testimony before this Committee on February 20, Secretary Sullivan stated that S. 1883 "is unnecessary" and would not

"measurably add to our current or planned efforts." Those current efforts include annual expenditures by the Department of approximately $80 million on tobacco-related matters.

In addition to being unnecessary, the review contemplated by S. 1883 would be expensive and would divert resources from considerably more pressing matters. The bill would create a large and costly new bureaucracy within the Centers for Disease Control, which has no experience with product regulation of this kind. Section 902(c) of the bill does provide that the Center may enter into contracts with other agencies to exercise its functions. It is possible that the Center would enter into such a contract, under which FDA would assume responsibility for reviewing and regulating tobacco additives.

It would be a grave mistake to burden FDA with this additional task, particularly when no need for additional review and regulation has been established. FDA already has an extraordinarily broad mandate, encompassing regulation of foods, prescription and over-the-counter pharmaceuticals, animal drugs, cosmetics, medical devices and radiological products. One out of every four consumer dollars is spent on products subject to FDA's jurisdiction.

In fiscal year 1989, FDA will employ approximately 7,200 persons, which is almost 600 persons fewer than the agency employed in fiscal year 1980. While its resources declined during the past decade, more than a dozen new laws

were enacted imposing new responsibilities on FDA. The AIDS crisis also has occupied the time of numerous agency scientists, physicians and other staff. FDA officials estimate that the agency needs more than 2,000 additional staff simply to meet its current responsibilities. In addition, a recent General Accounting Office report concluded that FDA has much greater difficulties than other federal agencies in retaining scientists and other professionals. See GAO, FDA Resources: Comprehensive Assessment of Staffing, Facilities, and Equipment Needed 25-31 (Sept. 1989).

Let me emphasize my belief that FDA, on the whole, does an outstanding job and performs a vital service in ensuring the safety and quality of the foods, drugs and other products subject to its regulation. As the figures just cited indicate, however, the agency's staff is already stretched too thin. It is unrealistic to expect that the existing staff could devote the necessary time to tobacco additives without interfering with their duties with respect to other products.

FDA's chronic lack of resources has, in fact, precluded FDA from completing in a timely manner other reviews that it has undertaken. For example, a court ruled in 1972 that completion of the Drug Efficacy Study Implementation (DESI), which began in 1966 for the purpose of implementing the effectiveness requirements of the Drug Amendments of 1962, had been unreasonably delayed. Although the DESI is now nearing completion, it is not yet finished. Similarly, FDA's

reviews of over-the-counter drugs and biological products under the 1962 amendments are still underway.

FDA also is still continuing to review color additives under the Color Additive Amendments of 1960 and food substances under the Food Additives Amendment of 1958. The 1960 law established an initial two and one-half year transitional period for reviewing evidence of the safety of color additives then in use. To accommodate scientific advances during the last thirty years, FDA has extended that period numerous times, and those extensions have been upheld by the courts. Recently, the agency removed the last "straight" color additive, FD&C Red No. 3, from the provisional list of additives in use in 1960, but other chemical forms ("lakes") of many of these color additives remain on the list. FDA's review of food substances, initiated by President Nixon in 1969, also has yet to be completed.

In view of the existing demands on FDA's resources, it would make little sense to require FDA to initiate another review project, particularly since no need has been shown for a new review of tobacco additives. For the reasons noted, FDA would have substantial difficulty completing such a project, and the project inevitably would consume resources needed by FDA to meet other responsibilities.

Public Disclosure Requirements

Sections 902(a) and 953(b)(1) of S. 1883 would direct the Secr ary to require the public disclosure, on product labels or package inserts, of the identity and quantity of tobacco additives. In view of the absence of any demonstrated concern with respect to additives, there is no basis for requiring the disclosure of these ingredients. Moreover, many additives are flavoring components that are closely guarded trade secrets. Unlike the 1984 ingredient reporting law, in which Congress expressly recognized this principle and protected the identity of additive information from public disclosure (15 U.S.C. § 1335a(a)(2)), S. 1883 would require disclosure of this information without regard to its status as trade secrets or the commercial importance of its continued confidentiality.

The protection of trade secrets is a well-established policy of Congress, which is evidenced in the labeling provisions of the Federal Food, Drug, and Cosmetic Act (FD&C Act). Section 403(i)(2) of the FD&C Act provides that spices, flavorings and colorings in food may be designated as such on product labels without individually identifying them. This exemption from the general requirement for label disclosure of each ingredient was intended to protect trade secret information. Congress recognized that the identities of flavors and similar substances are trade secrets because they impart distinctive characteristics to

specific products and that this highly sensitive information should not be disclosed.

Similarly, section 5(c)(3) of the Fair Packaging and Labeling Act (FLPA), under which FDA regulates cosmetic ingredient labeling, exempts trade secrets from disclosure. FDA has exercised its authority under this provision to exempt specific flavors and fragrances used in cosmetics and to provide for exemption of other ingredients shown to be trade secrets. 21 C.F.R. § 701.3(a).

It would be inconsistent with the general congressional policy to protect trade secrets, as well as the particular expressions of that policy in the Comprehensive Smoking Education Act, the FD&C Act and the FLPA, to require disclosure of tobacco additives without regard to their status as trade secrets.

Conclusion

An existing statutory mechanism is in place to review tobacco additives and to determine whether there is any basis for regulatory authority over these ingredients. Until that review has been completed, it is premature even to consider the new review and controls set forth in S. 1883. For the reasons noted, those provisions are wholly unnecessary and also are likely to be counterproductive.

Mr. RUPP. And I would also like to summarize briefly the points that we believe the committee should take into consideration when it is considering S. 1883 with respect to the additives issue.

During the past 19 years, my practice at Covington & Burling has focused on a variety of product regulation issues. I am appearing today on behalf of The Tobacco Institute to address the provisions of S. 1883 that would transfer authority to review tobacco additives and require public disclosure of such additives. We believe strongly that these proposed statutory changes are unnecessary and would be counterproductive.

In focusing on tobacco additives, it is important, Senator Simon, that the committee recognize that it is not writing on a clean slate. Following extensive deliberations, Congress dealt with tobacco additives in the Comprehensive Smoking Education Act of 1984. That act requires every manufacturer, packager and importer of cigarettes to provide annually to the Secretary of the Department of Health and Human Services a list of all ingredients added to tobacco. Five annual additive lists have been provided to the secretary under the 1984 Act and are under active review within HHS.

The additive review called for by the 1984 Act is both searching and comprehensive. The act requires the department to consider in reviewing the cigarette additives lists any and all research findings concerning individual additives and permits the department to engage in further research should it deem it necessary. The act also requires the secretary to submit periodic reports to Congress in the event the secretary believes that any additive in cigarettes presents a health risk to smokers.

To date the department has given no indication whatsoever that its review has created any basis for concern.

In the testimony that was given before this committee on February 20, Secretary Sullivan of HHS stated that in his view the additive provisions of S. 1883 are "unnecessary"—and I quote in using that word—and would—and again I quote—"not measurably add to our current or planned efforts".

Although there was much in the secretary's February 20th statement with which we would disagree we believe, like Secretary Sullivan, that it would make little sense to supplant the review mechanism that Congress created in 1984 for an entirely new mechanism, likely to be quite costly, for which no need has been shown.

We understand that some have suggested in that connection that it might be appropriate to shift the additive review function that currently resides at HHS to the Food and Drug Administration. For the reasons stated in Mr. Kingham's prepared statement, we believe that such a transfer would be a serious mistake. The FDA staff already is stretched far too thin, a fact that has prevented that agency from completing in a timely manner many of its important responsibilities. If there were some reason to assign the additive review function to FDA, the committee would need to be considering what current responsibility of FDA could be sacrificed. In fact, like Secretary Sullivan, we see no reason nor need for such a change.

We recognize that S. 1883 would go beyond the additive review provisions of the 1984 legislation in three respects. Specifically, the bill would require disclosure to the Center for Tobacco Products of

the amount of any additive being used. It would require disclosure to the public, cigarette brand by cigarette brand, of the identity of such additives and create new regulatory authority within the Center for Tobacco Products over cigarette additives. We believe that these amendments, like the proposed transfer of authority, are unnecessary, and I would like to address them each briefly if I may, Senator.

On February 13 of this year, we received a letter from Dr. Ronald Davis at HHS, asking us to submit on behalf of the domestic cigarette manufacturers information concerning the quantity of each ingredient added to tobacco during calendar year 1989. Two days later, on February 15, we responded to Dr. Davis' letter, assuring him that the companies would comply with his request. The information requested by Dr. Davis is now being assembled and is scheduled to be delivered to HHS within the next 2 weeks. I would ask that the letters that have been exchanged, which have been provided to the committee staff, be included in the record of the hearing as well.

Senator SIMON. They will be entered in the record.

Mr. RUPP. Thank you, Senator.

[Information follows:]

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1201 PENNSYLVANIA AVENUE, N. W.
P. O. BOX 7566
WASHINGTON, D.C. 20044
(202) 662-6000

FACSIMILE: (202) 662-6291
TELEX: 89-593 (COVLING WSH)
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JOHN P. RUPP
DIRECT DIAL NUMBER
(202) 662-5850

LONDON OFFICE
48 HERTFORD STREET
LONDON W1Y 7TF ENGLAND
01-495-5655

April 20, 1990

The Honorable Paul Simon
Senate Office Building
Washington, D.C. 20510

Dear Senator Simon:

At the recent hearing on S. 1883, you asked me to submit for the record information on programs undertaken by the tobacco industry in the United States to discourage smoking by young people. As I explained during the hearing, the industry's basic position is that young people should wait until they are adults to decide whether to smoke.

There are attached a report that describes major tobacco industry initiatives during the past three decades on youth smoking and copies of some of the advertising and educational materials that we have utilized. We request that this letter, with the attached materials, be made a part of the printed record of the recent hearing on S. 1883.

Sincerely,

John P. Rupp

John P. Rupp

cc: Hon. Edward M. Kennedy

... ON YOUTH SMOKING

Three Decades of Initiatives

Tobacco manufacturers have always believed that the decision to smoke or not is a choice to be made by informed adults. Over the years, the industry has taken the following steps to realize that belief. For example:

- In 1963 -- The industry ended all brand advertising and promotion in college publications and on campuses.

- In 1964 -- The industry adopted a code prohibiting advertising and promotion directed at young people, forbidding use of noted sports figures and other celebrities in advertisements, requiring that models in advertising must be, and must appear to be, at least 25 years old, and assuring that advertisements do not present smoking as a pastime which leads to success, sexual attractiveness or prominence.

- In 1969 -- The industry offered to end brand commercials on television and radio, pointing out their substantial, and unavoidable, audiences of young people, as contrasted with print advertising. Tobacco commercials left the air in 1971 as a result of Congressional action.

- In 1981 -- The industry adopted a new code of sampling practices which prohibits distribution within two blocks of youth activity centers, such as playgrounds, schools, campuses and fraternity or sorority houses.

- In 1982 -- On the industry's behalf, The Tobacco Institute began an advertising campaign which was to reach 110 million Americans with the message, "Do tobacco companies want kids to smoke? No. As a matter of policy. No. As a matter of practice. No. As a matter of fact. No."

- In 1984 -- The Institute launched its current "Responsible Living" program by offering a free parental guidebook, "Helping Youth Decide," prepared by the National Association of State Boards of Education. Another booklet, "Helping Youth Say No," followed. Both provide guidance on family communication to enable parents to help youngsters develop decision-making skills needed to deal wisely with everyday choices and with lifestyle decisions, such as smoking.

- In 1986 -- The Institute expanded the "Responsible Living" program by providing unrestricted grants to the National Association of State Boards of Education (NASBE) for funding Community Alliance Programs (CAPs) at the rate of ten a year. Towns and cities throughout the U.S. were invited to apply for the grants, which provide the impetus for a broad community-based effort to improve parent-youth interaction, using "Helping Youth Decide" and "Helping Youth Say No" booklets.

THE RESPONSIBLE LIVING PROGRAM

Two Tobacco Institute-funded booklets, "Helping Youth Decide" and "Helping Youth Say No" comprise the core of the program. Since their introduction, they have helped thousands of parents and teachers assist children in making decisions about important adult activities.

Their success has been remarkable. More than 700,000 booklets have been distributed nationwide at a cost of more than half a million dollars for printing alone. Demand continues to be high among parents and community organizations, where these materials are used to teach communications skills to parents and teens to discuss subjects as diverse as teen-age pregnancy, the impact of divorce on children, improving school performance and how to handle peer pressure.

The booklets have generated large numbers of unsolicited letters of appreciation from parents and support groups who have used these materials. Several Congressmen have sent them to all public high school students in their districts. One Catholic bishop has sent copies to all parochial high school students in his diocese.

Here are some typical comments:

> "Our program works to keep parents and children together, and your booklets are right on target in terms of dealing with the care issues...Thank you again for developing such a viable tool and also for being willing to distribute it free of charge. You are providing a very valuable service."

Milwaukee County Social Services,
Milwaukee, Wisconsin

"...have found it invaluable in my work with parents and youth. The copies I am requesting will be used at several parenting workshops."

Public Health Nurse, Mental Health Center,
High Point, North Carolina

"As the parent of one teen and two who will soon be teens (and as president of PTA Council), I found the information in the booklets just great. It is a great common sense approach to dealing with the issue which is most on the minds of parents today."

Greensburg, Pennsylvania

The Institute continues to promote the booklets to parents and teachers around the country through media appearances by the program's national spokesperson, Jolly Ann Davidson, a former president of NASBE. Upon hearing interviews conducted by Ms. Davidson, parents or young people can send for their free booklet. Interest generated by Ms. Davidson's appearances underlines the continued need to help parents and their children improve communications.

In addition, the Community Alliance Program (CAP), a program funded by the Institute, revolved around these booklets. This was a community-based nationwide effort. The booklets were used in a community setting focusing on the needs of a specific community. Each community tailored their programs and the use of the booklets to meet their specific needs. For example,

In Queens, New York, a CAP began as an informal group of parents concerned about drinking at teenage parties. It subsequently became an incorporated non-profit community service organization. The "Helping Youth Decide" booklet was used in these parent education workshops, targeted toward minority parents and the parents of at-risk students.

In Colorado Springs, Colorado, the CAP was formed within a middle school-based program focusing on building communication between young adolescents, parents and step-parents. Program coordinators also helped use the "Helping Youth Decide" material to expand a program to develop peer leaders in drug and alcohol use/abuse situations and in general problem solving.

Many CAP programs are freestanding today and serve communities around the country.

Questioning authority, testing rules and experimenting with adult behavior are all a part of growing up. Helping young people to make the right choices during this impressionable period is a difficult but important job. The tobacco industry is committed to making that job easier -- for parents and for young people. While advertising has no effect on causing young people smoke, peer pressure and family influence do.

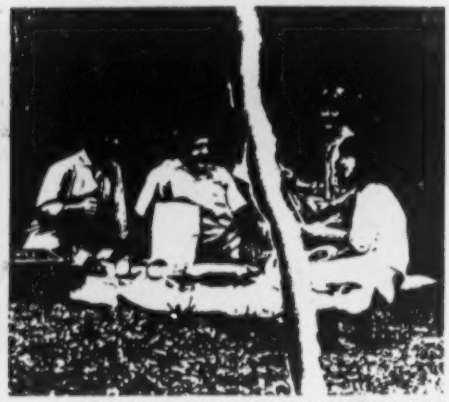
Few industries in America have taken such direct and voluntary action to steer its product away from young people. Perhaps that's one reason the prevalence of daily smoking among high school students has dropped from 29 percent in 1976 and to 21 percent in 1980 and has fluctuated between 18 and 21 percent ever since.

The Tobacco Institute
March, 1990

How to Get Your Teenager Talking – to You.

If you believe your young teenager is worth talking to, this free book is worth reading and using.

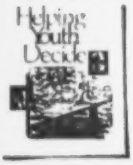
Developed by professional educators, "HELPING YOUTH DECIDE" can help you help with the important decisions too many teens are silently making alone ... whether or not to take a job, drink, smoke, borrow money, quit school, get married.



Single copies of "HELPING YOUTH DECIDE" are free to parents of teens, with funding from The Tobacco Institute.

Get your free copy and get your teenager talking to you. Fill out and send the coupon today.

Please send my free copy of "HELPING YOUTH DECIDE."



NAME _____

ADDRESS _____

_____

CITY _____

STATE _____ ZIP _____

Mail to: **The National Association of State Boards of Education**
P.O. Box 1176, Alexandria, VA 22313

A PUBLIC SERVICE OF THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION AND THE TOBACCO INSTITUTE.

This message from the National Association of State Boards of Education and the Tobacco Institute is appearing in six national magazines and *Parade*. If you have an adolescent and haven't gotten your copy yet, fill out the coupon and mail it today. Both you and your youngster will be glad you did!

Teenage Life in the 1980's

Life at Home

- The number of children under 18 living in single-parent households nearly doubled from 3.8 million in 1970 to 7 million in 1980. There are more than 10 million today.
- Fifty-five percent of children under 18 have both parents who work outside the home, leaving little time for supervision and meaningful communication.

Crime

- Of the total number of serious crimes committed in 1986, nearly 30% of them were committed by teenagers under 18.
- In 1986, nearly 70,000 teenagers were arrested for drug abuse violations and 132,000 were arrested for violation of liquor laws.

Teen Suicide

- The number of teenagers who have contemplated suicide has climbed to 30%, according to the 19th annual survey of "Who's Who Among American High School Students Annual Survey of High Achievers."

Drugs

- Fifty-five percent of teenagers named drug abuse as the biggest problem facing their generation according to the most recent Gallup Youth Poll.

Teen Sex

- More than 1 million teens become pregnant each year, and over 9,000 babies are born to unwed mothers age 14 or younger.
- Only half of all teen mothers ever finish high school.
- By age 19, eight in ten males and six in ten females will have had intercourse.

What's Helping Youth Decide All About?

It's no secret that raising a child is a demanding task. And it's no secret that being a teenager is tough too. The ***Helping Youth Decide*** book is an effort to help parents and their kids communicate better and relate to each other. The objective is to help family members better understand each other, talk more easily and effectively to each other and make responsible decisions that are agreeable to both parent and child.

The book is divided into three parts:

"Growing Pains" - the importance of improving communications between parents and adolescents

"How to Help" - helping parents to help their children develop communication and decision-making skills

"Homework for You Both" - exercises to help establish more open communications.

Growing Pains

Being a teenager means questioning the rules laid down by parents and by society. Adolescence is a time when children are trying to discover their identity while wondering who they are, what they believe and where they belong. It is the first time that young people are beginning to look toward the future.

In earlier times, the institutions of family, neighborhood and community provided stability that could help young people safely through the "growing up" process. Now society is increasingly fragmented and television has introduced children to all aspects of adult life. Good communication between parents and their children has become more crucial than ever. Young people need support and advice on how successfully to manage the "work" of the adolescent years.

How to Help

Good communication within the family is the foundation for the mutual trust that encourages responsibility. When parents and children are able to communicate well, they find it's much easier to resolve conflicts and arrive at mutually agreeable decisions. To communciate effectively, parents need to express accurately to their children their own ideas and feelings as well as to listen to and understand their youngster's thoughts and emotions. Adolescents, even more than younger children, need someone who will listen.

There are specific ways to communicate effectively and there are definite ways not to communicate. Frequently, instead of listening, parents react with responses that block communication. When parents listen with interest, children feel their ideas are valued, that they are respected. Such respect gives the child a sense of self-esteem and confidence.

Taking time to have a conversation alone with each child on a regular basis will help spot difficulties before they become real problems. Too often when parents talk to their youngsters, they correct, criticize or command. Though we may occasionally need to direct behavior, the conversation should be enjoyable for both parent and child. Some guidelines for talking with adolescents are to: show respect; be brief; be aware of your tone of voice; and be specific.

Responsible decision making is an important part of growing up. Young people need to practice making decisions in order to become self-directed, critical thinkers. Adults who suggest and help, rather than direct and decide, are more likely to instill the confidence adolescents need to make independent decisions.

Homework for You Both

The questionaires at the back of the booklet are the first step to taking a closer look at how parents and adolescents are communicating now.

There are also three exercises to help continue the journey toward improving the relationship:

Option 1: **Structured Discussions** Parent and child can look each other in the eye and attempt to say what is on their minds. They should try to stay on the subject since there is a tendency to ramble which can lead to confusion and frustration.

Option 2: **Role Reversal** This exercise helps parent and child to empathize and to listen more effectively to one another as the parent takes the role of the child and vice versa.

Option 3: **Letters** Some people have difficulty expressing themselves face to face. If parent and child write letters to each other as if they haven't seen each other for several months it can help them both learn to express feelings to one another.

Practice makes perfect. The ability to make choices rationally and responsibly is neither inborn nor easily acquired. Young people need help and practice in learning to make the decisions that affect their lives.

Senate of Pennsylvania

HARRISBURG, PA

Congratulations

In the Senate, September 26, 1984

Whereas, The Senate of the Commonwealth of Pennsylvania considers basic education to be an investment in the future of the Commonwealth; and

Whereas, The Senate of the Commonwealth of Pennsylvania supports and encourages the active involvement of parents, business and other community interests in the betterment of our schools and educational facilities; and

Whereas, The National Association of State Boards of Education and the Tobacco Institute have jointly set forth a program designed to improve the quality of communication between parents and school age children, particularly as such communications apply to lessons in decision making.

Now therefore, the Senate of the Commonwealth of Pennsylvania pays tribute to the National Association of State Boards of Education and the Tobacco Institute in recognition of their positive efforts as evidenced by the publication Helping Youth Decide;

And further directs that a copy of this document, sponsored by Senator Ralph W. Hess, be transmitted to The National Association of State Boards of Education, 701 North Fairfax Street, Alexandria, Virginia and The Tobacco Institute, 1875 I Street, N.W., Washington, D.C.

Attest:

Mark R. Corrigan, Secretary
Senate of Pennsylvania

Commonwealth of Pennsylvania

Citation by The House of Representatives

WHEREAS, The House of Representatives of the Commonwealth of Pennsylvania considers basic education to be an investment in the future of the Commonwealth; and

WHEREAS, The House of Representatives of the Commonwealth of Pennsylvania supports and encourages the active involvement of parents, business and other community interests in the betterment of our schools and educational facilities; and

WHEREAS, The National Association of State Boards of Education and the Tobacco Institute have jointly set forth a program designed to improve the quality of communication between parents and school-age children, particularly as such communications apply to lessons in decision making.

Now therefore, the House of Representatives of the Commonwealth of Pennsylvania extends special commendations to the National Association of State Boards of Education and the Tobacco Institute in recognition of their positive efforts as evidenced by the publication Helping Youth Decide; and further directs that a copy of this citation be delivered to the National Association of State Boards of Education, 701 North Fairfax Street, Alexandria, Virginia and the Tobacco Institute, 1875 I Street, N.W., Washington, D.C.

Submitted by:

James M. Burd

James M. Burd, Sponsor

K. Leroy Irvis

Speaker of the House of Representatives

Attest:

John J. Zubek

Chief Clerk of the House of Representatives

September 25, 1984

Date

SENATE RESOLUTION TEN

A SENATE RESOLUTION extending commendations to the National Association of State Boards of Education and the Tobacco Institute.

WHEREAS, The citizens of the state of Indiana consider basic education to be an investment in the future of the State; and

WHEREAS, The citizens of the state of Indiana support and encourage the active involvement of parents, business and other community interests in the betterment of our schools and educational systems; and

WHEREAS, The National Association of State Boards of Education and the Tobacco Institute have jointly set forth a program designed to improve the quality of communication between parents and school-age children, particularly as such communications apply to lessons in decision making:

THEREFORE,

BE IT RESOLVED BY THE SENATE OF THE GENERAL ASSEMBLY OF THE STATE OF INDIANA:

SECTION 1. That special commendations be extended to the National Association of State Boards of Education and the Tobacco Institute in recognition of their positive efforts as evidenced by the publication "Helping Youth Decide".

SECTION 2. That the Secretary of the Senate is hereby directed to transmit copies of this resolution to the National Association of State Boards of Education, 701 North Fairfax Street, Alexandria, Virginia and the Tobacco Institute, 1875 I Street, N.W., Washington D.C.

Adopted by voice vote this twelfth day of April, 1985.

Carolyn Mosby
CAROLYN BROWN MOSBY
State Senator

John R. Sinks
JOHN R. SINKS
State Senator

Julia M. Carson
JULIA M. CARSON
State Senator

Robert D. Garton
ROBERT D. GARTON
President Pro Tempore
State Senator

Frank L. O'Bannon
FRANK L. O'BANNON
Minority Leader
State Senator

Sandra B. Culp
SANDRA B. CULP
Secretary of the Senate

STATE OF MICHIGAN

SPECIAL TRIBUTE

BE IT BE KNOWN, That it is with great respect for the sensitivity this program reflects that we are proud to commend the Tobacco Institute and the National Association of State Boards of Education in recognizing their program, "Helping Youth Decide." This worthy endeavor is an attempt to assist parents in communicating with their children during the teenage years when young people face a host of important decisions.

In this joint venture with the National Association of State Boards of Education (NASBE), the Tobacco Institute, which is comprised of the tobacco product manufacturers of America, is continuing its responsible approach to discouraging young people from smoking and to postpone that decision, which the Institute feels is, like so many of life's choices, a decision best made as an adult. The public service program of "Helping Youth Decide" is an ambitious cooperative venture dedicated to fostering in America's young people sound decision-making skills.

"Helping Youth Decide," a project aimed at decision making on all levels and on all questions, encourages frank discussion and sharing of ideas between parents and their children. In its brochures, the relationship of trust and mutual respect between a parent and a child is considered central to sound decision making. In our fast-paced, often complex society, such sensitivity to the need for parents to develop open communication with their children provides a genuine and important service.

IN SPECIAL TRIBUTE, Therefore, This document is signed and dedicated to commend the National Association of State Boards of Education and the Tobacco Institute on their "Helping Youth Decide" program. We wish them every success in this venture to strengthen the decision-making skills of young people.

JOHN M. ENGLER
Senate Majority Leader

WILLIAM FAUST
Senate Democratic Leader

J. Michael Busch
Minority Floor
House Republican Leader

Speaker of the House

The Eighty-third Legislature
At Lansing
March 1, 1985

National Association of State Boards of Education
701 N. Fairfax St., Suite 340
Alexandria, VA 22314
(703) 684-4000

December 3, 1985

Helping Youth Decide Questionnaire

Within the past few months, you received a copy of Helping Youth Decide, a guide to parent-child communication. The authors of the guide want to know about the use of the booklet, in order to write other booklets for parents and teens. We would appreciate it if the adult in your family who used the guide most extensively would take a few minutes to fill out this questionnaire, refold the self-mailer and send it back to us by December 13, 1985. **Please help us learn whether you used and like this publication.** All responses will remain anonymous and confidential. Thank you very much.

A. Why did you order Helping Youth Decide? (Please choose the single most appropriate response.)

____ (1) Curiosity
____ (2) To help me communicate with my teenager(s)
____ (3) To help me communicate with my younger child(ren)
____ (4) To help me in my work as a teacher, counselor, or in another professional or volunteer capacity. NOTE: If you checked this response, please skip to question 1 on page 4.
____ (5) Other _____
(please specify)

B. How long after the booklet arrived did you read it? (Choose the one response that seems most appropriate.)

____ (1) I read it right away.
____ (2) I read it within two weeks.
____ (3) I waited several weeks or months.
____ (4) I have never read Helping Youth Decide. NOTE: If you checked this response do not answer any additional questions. Please refold the questionnaire so the NASBE address on page 2 is on the outside. Staple or tape closed and mail. Thank you very much for your help.

C. Did anyone else in your household read Helping Youth Decide? (Check all the answers which are appropriate for your household.)

____ (1) Yes, my spouse read Helping Youth Decide.
____ (2) Yes, my teenage son(s) read Helping Youth Decide.
____ (3) Yes, my teenage daughter(s) read Helping Youth Decide.
____ (4) Yes, others in my family read Helping Youth Decide (e.g., a younger child or grandparent).
____ (5) No, I was the only family member to read the booklet.

D. How would you best describe the approach to parent-child communication included in Helping Youth Decide? (Choose one.)

____ (1) A program to help children cope with peer pressure
____ (2) A process for parent-child decision-making through listening and communication
____ (3) A process for parental control of youth behavior

National Association of State Boards of Education
701 North Fairfax Street
Suite 340
Alexandria, VA 22314

E. After reading the booklet, did you or other family members decide to try the communications techniques it describes?

_____ (1) Yes _____ (2) No

If yes: (check one)
_____ (1) I used the communications techniques once.
_____ (2) I used the communications techniques a few times.
_____ (3) I have incorporated the communications techniques into my everyday relationship with my child or children.

F. Which of the following statements would describe the way in which you used Helping Youth Decide? (Check all that apply.)

_____ (1) My teenage son(s) and I filled out the questionnaires and completed the exercises in the booklet.
_____ (2) My teenage daughter(s) and I filled out the questionnaires and completed the exercises in the booklet.
_____ (3) I tried the communication techniques but did not use the questionnaires included in the booklet.

G. Which of the following statements would describe the conditions under which you used Helping Youth Decide? (Check all that apply.)

_____ (1) I was having difficulty communicating with a son and thought the booklet information or approach might help.
_____ (2) I was having difficulty communicating with a daughter and thought the booklet information or approach might help.
_____ (3) My son or daughter was having difficulties at school and I hoped the booklet would provide assistance.
_____ (4) My son or daughter was having a behavior problem and I hoped the booklet would help.
_____ (5) There was no particular problem in my family but I hoped the information or approach in the booklet would aid me in communicating with my child or children.

H. What features did you find appealing? (Check all that apply.)

_____ (1) The length of the booklet
_____ (2) The layout (pictures, print, format)
_____ (3) The level of writing (appropriate for you)
_____ (4) The information it contained
_____ (5) Other _____
(please specify)

I. What features did you find unappealing. (Check all that apply.)

____ (1) The length of the booklet
____ (2) The layout (pictures, print, format)
____ (3) The level of writing (appropriate for you)
____ (4) The information it contained
____ (5) Other _____
(please specify)

J. Did you think the length was: (Circle one)

Too short? (1) Just right? (2) Too long? (3)

K. Overall, how useful did you find this booklet? (Circle one.)

Very useful (1) Useful (2) Somewhat useful (3) Not useful (4) Did not use (5)

L. Was there an improvement in parent-child communication in your family as a result of using the communication techniques? (Check one.)

____ (1) Yes ____ (2) No ____ (3) Not applicable

M. Have you recommended this publication to others?

____ (1) Yes ____ (2) No

N. What topics would you recommend for future publications? (Check all that apply.)

____ (1) Peer pressure
____ (2) Choosing a career
____ (3) Study habits and achievement
____ (4) Teamwork and competition
____ (5) Other _____
(please specify)

NOTE: The following questions ask some personal information. We ask that even if you decide not to answer, that you mail back the questionnaire. We assure you if you do answer these questions, you will remain anonymous.

O. I am a parent with a teenage child or children living at home.

____ (1) Yes ____ (2) No

P. I am (Circle one): (1) Single (2) Married (3) Divorced

Q. My sex is (Circle one): (1) Male (2) Female

R. I have _____ children at home.
(insert #)

S. My annual household income is within the following range (Check one only):

____ (1) $0 to $10,000
____ (2) $10,001 to $20,000
____ (3) $20,001 to $30,000
____ (4) $30,001 to $40,000
____ (5) $40,001 to $50,000
____ (6) $50,001 or above

Please stop here, refold the questionnaire so the NASBE address on page 2 is on the outside. Staple or tape closed and mail. Thank you very much for your help and for taking the time to respond to our inquiry.

National Association of State Boards of Education
701 North Fairfax Street
Suite 340
Alexandria, VA 22314

T[1]. If you answered the first question by indicating that you requested Helping Youth Decide for your professional or volunteer work with parents and/or children, please be so kind as to answer a few short questions.

T[2]. Which of the following statements describes the way you used Helping Youth Decide? (Check all that apply.)

_____ (1) I used the booklet in groups of parents.
_____ (2) I used the booklet in groups of children/teens.
_____ (3) I used the booklet with combined groups of parents and teens.
_____ (4) I used the booklet with individual adults.
_____ (5) I used the booklet with individual teenagers.
_____ (6) I used the booklet with individual families.
_____ (7) I did not use the booklet.
_____ (8) Other _____

T[3]. If you used Helping Youth Decide, how useful did you find it? (Circle one.)

Very useful	Useful	Somewhat useful	Not useful	Did not use
(1)	(2)	(3)	(4)	(5)

T[4]. What topics would you recommend for future publications? (Check all that apply.)

_____ (1) Peer pressure
_____ (2) Choosing a career
_____ (3) Study habits and achievement
_____ (4) Teamwork and competition
_____ (5) Other _____
(please specify)

T[5]. I am a (Check one):

_____ (1) Teacher in an elementary school
_____ (2) Teacher in a secondary school
_____ (3) Counselor in a school
_____ (4) Social worker
_____ (5) Therapist
_____ (6) Volunteer worker in a social agency
_____ (7) Volunteer worker in a school
_____ (8) School administrator
_____ (9) Youth group leader
_____ (10) Other _____
(please specify)

Please stop here, refold the questionnaire so the NASBE address on page 2 is on the outside. Staple or tape closed and mail. Thank you very much for your help and for taking the time to respond to our inquiry.

Mr. RUPP. Mr. Chairman, the fact is that the cigarette manufacturers have complied with every request that has been made of them by HHS since the current statutory provisions on additives were approved in 1984. Indeed, the manufacturers began voluntarily to provide additive information to HHS in 1979, even though they were not then under any statutory obligation to do so.

Senator SIMON. If you could conclude your statement, please.

Mr. RUPP. Thank you, I will.

On behalf of the manufacturers, we have repeatedly and persistently informed HHS that the manufacturers are prepared to cooperate fully in every aspect of their investigation. A review is ongoing. No problems with the review have been identified by Secretary Sullivan or anyone else at HHS, and we believe that that review should not be disrupted, changed or altered in the way this bill would suggest.

There are other points that are made in Mr. Kingham's statement. We are concerned about the question of confidentiality, and perhaps we can discuss that in response to questions.

Senator SIMON. May I ask one question of you, Mr. Rupp—and unfortunately, like Senator Kennedy, I am caught between meetings here, and we are going to have to move this along. The Tobacco Institute, in terms of philosophy, do they believe the Federal Government has a proper role in discouraging cigarette use?

Mr. RUPP. Well, the company's basic policy—all of the domestic companies have the basic policy of not wanting young people to smoke. And I don't think they have opposed efforts by responsible entities such as the Congress in reasonable ways to discourage smoking by young people.

I might add that the companies themselves have initiated a variety of programs with the same goal in mind.

Senator SIMON. To discourage young people from smoking?

Mr. RUPP. To discourage young people from smoking. The company's position is that tobacco smoking is something that ought to be decided upon by adults, not children.

Senator SIMON. I would be interested if you could submit for the record first what the tobacco companies are doing along that line, because I was not aware of that, and second, what we ought to be doing at the Federal level to discourage young people from smoking.

Mr. RUPP. We would be happy to do so, Senator.

Senator SIMON. OK. We thank you both very much for your testimony.

Mr. RUPP. Thank you.

Dr. WILLIAMS. Thank you, Senator.

Senator SIMON. Our final panel includes Burt Neuborne, professor at New York University School of Law, with the Freedom to Advertise Coalition; Vincent A. Blasi, professor at Columbia University School of Law; Mort Halperin, director of the American Civil Liberties Union, and Floyd Abrams, of The Tobacco Institute.

Again, we will enter your full statements in the record.

Professor Neuborne, we will start with you.

STATEMENTS OF BURT NEUBORNE, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY, REPRESENTING THE FREEDOM TO ADVERTISE COALITION; VINCENT A. BLASI, PROFESSOR, COLUMBIA UNIVERSITY SCHOOL OF LAW, NEW YORK, NY; MORTON H. HALPERIN, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, DC, AND FLOYD ABRAMS, REPRESENTING THE TOBACCO INSTITUTE

Mr. NEUBORNE. Thank you, Senator.

My name is Burt Neuborne, and I am a professor of law at New York University.

I would like this afternoon to discuss with the committee the concerns that the Freedom to Advertise Coalition has about the aspects of S. 1883 that would delegate to local regulatory bodies, approximately 6,000 local governmental units, the essentially standardless power to regulate tobacco advertising under the bill.

The essence of the provisions of the bill that we are concerned with delegate to local entities the power to regulate tobacco advertising whenever it is read or seen by people under 18, and whenever it is deemed essentially local in nature by local authorities.

Not surprisingly, the bill doesn't effectively define precisely what type of advertising it would cover, in large part because I think it would be impossible to do so. And we don't take the draftsmen of the bill to task for their failure to define the aspect of advertising that would be covered by the bill any more precisely than they have. It would probably be impossible to do it.

The net effect of the bill, whether it is intentional or not, is to place at the local level fundamental decisions about the regulation of tobacco advertising. And the philosophical question that we think the bill poses is whether, when you are confronted with the kinds of controversial speech that tobacco advertising entails, whether it is appropriate national policy to delegate the regulation of that speech to local governmental entities or whether the regulation of the speech ought to be, as a matter of national communications policy, the responsibility of the Congress and the Federal authorities.

Usually, of course, this issue does not come up because usually speech cannot be regulated at all by the government, and so we don't have to decide which level of government will regulate the speech.

But when, as with tobacco advertising, speech becomes sufficiently controversial so that there is clearly a legitimate degree of regulation that can be attached to it, the hard question is who should do the regulation—should it be a national regulation or should it be delegated to State and local authorities?

Our regulatory history in the area of controversial speech argues very strongly for the retention of a national responsibility in this area. For example, back in the Fifties, when we were having very serious trouble with controversial political speech, the U.S. Supreme Court held that State and local authorities ought not to be permitted to prosecute individuals for sedition, that that should be a national responsibility pursuant to uniform national rules, because they knew that to the extent that you have controversial speech, and you delegate it out to local authorities under an essen-

tially standardless mechanism, those local authorities will understandably use their power in an attempt to crush what they see as controversial speech. And consistently in our national regulatory policy, whenever controversial speech has been at issue, we have retained it at the national level and attempted to impose national restraints on it instead of delegating it out to local authorities. When one delegates controversial speech to local authorities, it is an open invitation to those authorities to use their power inappropriate to attempt to sensor it. And it has come up four times—at least four times—in recent years.

It came up in connection with the sedition prosecutions in the Fifties. And we successfully held those prosecutions at the national level and spared ourselves a great deal of agony and improper censorship.

It came up in the area of libel directed to public officials. Prior to the U.S. Supreme Court's decision in *Sullivan*, the regulation of potentially libelous speech directed at public officials was local in nature under the local tort law. The results were a disaster, as the facts of the *Sullivan* case demonstrate. That type of discretionary power exercised by local officials will inevitably be used in a way to attempt to crush the unpopular speech, and the constitutionalization of the libel law is essentially a movement to a uniform national regulatory structure rather than State and local regulation at the local level.

The third classic example would be the regulation of cable television. We now recognize that cable television, if left to local regulation, gets into trouble over and over again. And over and over again, what we have had to do is go to national regulatory standards, uniform regulatory standards, in order to assure the effective regulation of that form of speech.

The question may be asked why should we worry about tobacco advertising—after all, isn't it a terribly controversial type of speech, and does it have any constitutional protection at all. And of course, I think that is ultimately what this bill is all about. If you think that tobacco advertising has not constitutional protection, or essentially minimal constitutional protection, and can be wiped out as a matter of government fiat, then there is no real concern about the delegation here, because whether the national government does it or the local government does it, you are not dealing with speech that has any constitutional protection.

But if, as I believe, the U.S. Supreme Court continues to recognize that commercial speech enjoys a very high degree of constitutional protection under our system and that it would be inappropriate for the government to attempt to manipulate consumer choice about a lawful product by attempting to control the nature of the flow of information to consumers—if, as I believe, the purpose of governmental regulation of advertising should be to assure that consumers have an open and free choice, not a government-manipulated choice, about whether or not they should consume a lawful product—then there is serious concern the type of standardless delegation here will lead to unconstitutional behavior at the local level.

Senator SIMON. If you could conclude your remarks, please.

Mr. NEUBORNE. I'll sum up, thank you, Senator.

The unconstitutional type of behavior that we can anticipate at the local level is illustrated by the bills that are pending in the House that are ostensibly aimed at protecting children by eliminating imagery and color from cigarette advertising, but that in fact are so overbroad that they would wipe out the effective advertising of the product to adults as well. It is the same dilemma, the same problem that Congress faced in the dial-a-porn legislation—the temptation to go too far is very difficult to resist, and if that temptation is given to 6,000 local officials, there is no question that this bill is an invitation to widespread censorship.

Thank you.

Senator SIMON. Thank you.

[The prepared statement of Mr. Neuborne follows:]

Testimony on S. 1883 of Burt Neuborne
Professor of Law, New York University
on Behalf of the Freedom to Advertise Coalition

Mr. Chairman and members of the Committee:

Thank you for this opportunity to appear before you. My name is Burt Neuborne. I am a Professor of Law at New York University. For much of my career, I have been a practicing lawyer concerned with the protection of the values of free speech and individual autonomy codified in the First Amendment. I appear this afternoon on behalf of the Freedom to Advertise Coalition to express the Coalition's concern that the provision of S. 1883 authorizing some 6,700 units of local government to make independent, overlapping and almost certainly conflicting judgments concerning the appropriate format and content of tobacco advertising poses a serious threat to a coherent and effective national communications policy regarding the advertising of tobacco products.

The Freedom to Advertise Coalition was formed in 1987 to protect the First Amendment rights of consumers and advertisers to a free flow of truthful and non-deceptive information concerning the merits of all lawful products. The Coalition's members include the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, the Magazine Publishers Association, the Outdoor Advertising Association of America, and the Point of Purchase Advertising Institute.

Tom Boggs testified on behalf of the Coalition on February 20 at the first hearing on this bill. He requested permission,

which was gratiously granted, for the Coalition to submit further written analysis. My written testimony constitutes that analysis.

Although the provisions of S. 1883 apply solely to the advertising of tobacco products, the invitation to a Balkanization of the nation's information markets poses a clear and present danger to the very concept of a national free market in consumer information.

At best, the delegation of regulatory power to local entities contained in S. 1883 will Balkanize the speech process by subjecting it to a patchwork of local regulations; encumber the effective delivery of the consumer warnings currently mandated by national policy; and impose enormous and unnecessary costs on the communications industry and the consumer. At worst, contrary to the presumed intentions of the bill's sponsors, the delegation of uncontrolled regulatory power to local authorities will result in a de facto ban on tobacco advertising because local zealots, unconstrained by the necessity of assembling broad political support, will use the power granted by the statute to wage guerrilla war on tobacco advertising. No system of highly controversial speech directed to a nationwide mass audience could withstand an invitation to 6,700 localities to impose a crazy-quilt of overlapping and conflicting regulations. Indeed, the Coalition believes that many supporters of S. 1883 see it as the Trojan Horse by which tobacco advertising may ultimately be banned. Having been unable to marshall the political or legal

support necessary to achieve censorship directly, some supporters of S. 1883 hope to use its local delegation provisions to achieve de facto censorship by indirection.

With the Committee's permission, I will divide my remarks into three areas. First, I will briefly reiterate the Coalition's longstanding views concerning the appropriate role of Congress in regulating the advertising process. The Coalition does not believe that serious disagreement exists between the bill's sponsors and the advertising community on this point. Second, I will discuss the wording of certain aspects of Sec. 955 of S. 1883 that increase the likelihood of its abusive - and unconstitutional - use as a censorship device at the local level. Finally, I will argue that even without the objectionable language, the bill's central premise is flawed in that the effective and efficient pursuit of a national communications policy in areas of controversial speech calls for uniform, national regulations, and not a patchwork of local speech controls.

I. The Appropriate Role of Government in the Regulation of the Advertising Process

The bedrock of our political and economic system is autonomous, individual choice.

Our system of political democracy is premised upon the belief that individual citizens are capable of rational and

automomous choice concerning the governance of society. In order to exercise such a rational and informed choice, citizens must be guaranteed an unhampered flow of relevant information. When government regulates the flow of information relevant to the making of an informed political choice, we recognize that the resulting choice is not truly free because it was influenced by a governmentally-skewed flow of information. Not surprisingly, therefore, the Supreme Court has jealously guarded the First Amendment rights to disseminate and to receive information needed to make informed and autonomous political choices. Eg. Texas v. Johnson, 109 S.Ct. 2533 (1989) (flag burning protected political speech); Lamont v. Postmaster General, 381 U.S. 301 (1965) (invalidating Congressional statute interfering with receipt of political propaganda from abroad).

Our economic system of consumer sovereignty is similarly premised on a commitment to rational and autonomous choices by individual consumers concerning the governance of their economic lives. As with political democracy, consumer sovereignty depends upon a free flow of relevant information to the ultimate decision-maker, assuring the consumer the ability to make independent choices between and among lawful products. When government seeks to control the flow of information to the consumer in order to influence his or her ultimate choice, the integrity of our system is threatened. Instead of a free and autonomous choice between and among lawful products, a consumer subjected to a government-controlled information flow is

manipulated into a government-preferred choice. Not surprisingly, as with political speech, the Supreme Court has granted First Amendment protection to the free flow of information to consumers relevant to the making of informed consumer choice. Eg. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); Carey v. Population Services, Int'l., 431 U.S. 678 (1977); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Central Hudson Gas & Electric Co. v. Public Svc. Comm'n 447 U.S. 557 (1980); In re RMJ, 455 U.S. 191 (1982); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983); Zauderer v. Disciplinary Counsel, 471 U.S. 626 (1985); Shapero v. Kentucky Bar Ass'n, 108 S.Ct. 1916 (1988).

Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986) is occasionally cited erroneously for the proposition that the Supreme Court has given Congress the green light to use control over advertising as a covert method of regulating consumer behavior. Thus, the argument goes, under Posadas, government may attempt to dampen demand for a lawful product by censoring the flow of truthful information about it. However, despite Chief Justice Rehnquist's unfortunate dictum, Posadas was not an attempt to deprive consumers of information about a lawful product.

Posadas involved an attempt by local authorities to regulate advertising of casino gambling to the native population of Puerto Rico. As originally conceived, the regulation was an

attempt to bar natives of the Island from receiving any information about casino gambling, despite its lawful status. Thus, under the original restrictions, casino advertising could not appear in the local Spanish language press because natives might read it. The highest court of Puerto Rico declared the original version unconstitutional. In its place, it substituted a ban on advertisements "aimed" at the native population. Thus, under the modified regulation, advertisement of casino gambling in the local Spanish language press was lawful, as long as it was not "aimed" at the native population. It was the modified version of the regulation that was upheld by the Supreme Court in Posadas.

While serious doubt exists about the propriety of the Court's holding that natives of Puerto Rico are especially vulnerable, there is nothing revolutionary in the holding of Posadas that government may regulate the flow of advertising to a particularly vulnerable group. Of course, the use of racial or sexual stereotyping in determining group vulnerability would be highly offensive and would violate the Equal Protection Clause. Moreover, as the courts of Puerto Rico held in Posadas, even when a truly vulnerable group - like children - is at issue, Congress may not protect children by denying the rest of population access to constitutionally protected information. Sable Communications Co. v. FCC, 109 S.Ct. 2829 (1989); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983).

Similarly, SUNY v. Fox, 109 S.Ct. 3028 (1989) has been cited erroneously for the proposition that little or no constitutional restrictions apply to the choice of means used to regulate commercial speech. However, while the Court in SUNY rejected a mechanical application of the "least drastic means" test in commercial speech settings, the Court reiterated the requirement that commercial speech regulations be "narrowly tailored". Moreover, it is important to note that the restriction at issue in SUNY involved a ban on all commercial activity, including the sale of tupperware, not purely the speech about such sale. In addition, those who cite SUNY often omit the fact that the court did not uphold the regulation at issue. It only sent the case back to lower courts for further consideration.

While the First Amendment standards governing political and commercial speech differ, commercial speech enjoys significant First Amendment protection. The Freedom to Advertise Coalition believes that Congress should never regulate advertising in an effort to manipulate the ultimate consumer choice. Rather, Congress' regulatory role should be focussed on assuring that consumers receive the raw material necessary to the making of an informed and autonomous choice between and among lawful products.

It is against the background of the constitutionally protected nature of commercial speech that the provisions of S. 1883 inviting local regulation of tobacco advertising must be assessed. As currently conceived, the Coalition believes that

the bill is a clear invitation to unconstitutional local censorship.

II. The Invitations to Unconstitutional Local Regulation Present in the Current Version of S. 1883

The most obvious invitation to unconstitutional local regulation present in the bill is its standardless delegation to 6,700 local governmental entitites of the power to enact "additional restrictions on the advertising... of tobacco products to persons under the age of 18". Given the highly charged emotional climate surrounding tobacco advertising, it is a virtual certainty that local groups will attempt to use the power to protect children as a lever to eliminate effective advertising of tobacco products to adults.

We have already witnessed two recent examples of similar attempts to parlay legitimate concern over the welfare of children into a device to censor controversial speech flowing to adults. In Sable Communications Co. v. FCC, 109 S.Ct. 2829 (1989), Congress was legitimately concerned over the effect of sexually explicit telephone messages on children. However, instead of focussing on the narrow issue of protecting children, Congress allowed itself to be stampeded into an ill-considered ban on all "offensive" telephone messages, even those that were constitutionally protected for adults. The result was a predictable invalidation of the entire regulatory structure by a unanimous Supreme Court. Similarly, in Bolger v. Youngs Drug

Prod. Corp., 463 U.S. 60 (1983), Congress was concerned over the impact of contraceptive advertising on children. Once again, however, Congress permitted a legitimate concern with children to be used as a justification for a flat ban on the mailing of unsolicited contraceptive advertisements to the home. Once again, the Court unanimously invalidated the statute, noting that "the level of discourse... simply cannot be limited to that which would be suitable for a sandbox". See also Butler v. Michigan, 353 U.S. 380 (1957).

One need not look far for the analogous attempt to use concern for children as a thinly veiled device to achieve widespread censorship of tobacco advertising directed to the adult population. Reps. Synar and Luken have sponsored bills in the House that would ban all images and colors from tobacco advertising in an ostensible attempt to protect children. Despite the fact that the Supreme Court has explicitly ruled that images and colors cannot be banned from lawyer advertising and that such advertising cannot be placed in a verbal straitjacket (Zauderer v. Disciplinary Counsel, 471 U.S. 626 (1985) and In re RMJ, 455 U.S. 191 (1982)), Reps. Synar and Luken have sought to use concern for children as a wedge for widespread censorship of imagery and color directed to adults. While they have been unable to marshall the necessary political or legal support for their bills at the national level, the delegation to local authority contained in S. 1083 constitutes an open invitation to local zealots to cloak attempts at widespread censorship of the

adult population in the rhetoric of concern for children. As currently phrased, nothing in S. 1883 would prevent zealots intent on censoring the advertisement of tobacco to adults from using ostensible concern for children as a springboard to full-blown censorship.

The fact is that the Federal Trade Commission is fully empowered to move against any tobacco advertisement that intentionally targets children. Chairman Steiger has expressed her concern over advertisements that target an illegal market and has expressed her intentions to regulate any such activity. Thus, the unconstrained delegation to local authorities contained in S. 1883 is unnecessary, as well as an invitation to years of socially unproductive and enormously expensive litigation.

The second invitation to unconstitutional local regulation contained in S. 1883 is the authorization of "additional restrictions on ... the placement or location of advertising for tobacco products that is [sic] displayed solely within the [local] geographical area...." Once again, given the emotionally charged atmosphere surrounding tobacco advertising, the delegation, as currently worded, is an open invitation to unconstitutional censorship.

First, it contains no meaningful description of the nature of the "additional restrictions" that are authorized. The bill's ambiguity renders it a virtual certainty that local authorities will attempt substantive regulation of the content of tobacco advertising. The bill's ambiguity virtually invites local

authorities to attempt to "protect" allegedly vulnerable segments of the population against advertising that "targets" them as prospective consumers. However, well-meaning attempts to single out segments of the population for special protection against lawful advertising are based upon stereotypical notions of group vulnerability and incompetence that have plagued attempts to achieve true equality for both women and people of color in the United States. Too often, a paternalistic concern for a so-called vulnerable group has been the mechanism for subordination and suppression. Men "protected" women out of the right to vote, the right to practice law and the right to economic equality. The very same paternalism that seeks to shield women from tobacco advertising is currently being used to bar them from desirable jobs in industry. Whites "protected" people of color out of equal educational opportunities and their very existence as free men and women. A well-meaning bill that invites local officials to "protect" women and people of color from tobacco advertising because they are deemed more vulnerable - and less competent - than white males merely resurrects the canard of group stereotype that remains our single greatest obstacle to true equality.

Second, the bill's definition of so-called "local" advertising is incomprehensible. For example, would an advertisement in The New York Times qualify as a "local" advertisement? Suppose a newspaper or magazine does not have a national circulation. Would its advertising copy be subject to the statute? What about an ad in The Washingtonian Magazine?

Would an ad in the transit system that crosses from the suburbs to the center city be covered? The bill's definition of local advertising appears to be based on a concept of fixed geographical situs. However, much advertising occurs in portable form, generally in publications, or by the use of flyers or handouts. It is simply impossible to apply a geographical situs rule to such portable forms of advertising.

Finally, the bill's attempt to draw a meaningful line between "national" advertising that would be subject to a uniform national rule and "local" advertising that would be subject to an ill-defined set of "additional restrictions" on "placement or location" ignores the reality of the modern information market. National products are advertised and marketed pursuant to national marketing strategies. The fact is that separate billboards or point-of-purchase displays are not created for each locality. Requiring local tailoring of a national campaign to take into account the idiosyncratic local regulations that would inevitably follow the passage of S. 1883 would make national advertising campaigns virtually impossible. The unintended effect of the bill would be to place local organs of communication at an enormous competitive disadvantage with their national cousins. Given a choice of expending scarce advertising funds on a national, uniform format and wasting the funds on tailoring the message to burdensome local regulations, advertisers will inevitably gravitate to the national media, leaving local organs of communication to seek other forms of

financial support. In fact, the unintended effect of the bill will be to shut off the welcome recent renaissance of local newspapers designed to serve an otherwise ignored racial or ethnic community.

When one views the almost certain local consequences of the bill as currently drafted, it is a First Amendment disaster. Even if we ascribe perfect good faith to local regulatory efforts, the resulting cacophonous system of speech regulation would pose insuperable obstacles to any attempt at efficient and effective attempts at national communication.

III. The Choice Between National and Local Regulation of Controversial Forms of Communication

Entirely apart from the problems of draftsmanship and the degree of First Amendment protection enjoyed by tobacco advertising, the statute poses a fundamental question of national communications policy. When speech becomes sufficiently controversial to warrant a significant degree of governmental regulation, should speech regulation be carried out pursuant to a uniform, national policy, or should the regulation be carried out by a patchwork of 6,700 local governmental units?

In most settings, the First Amendment insulates speech from significant governmental regulation. Accordingly, the question of whether to regulate at the national or the local level does not arise. When, however, as in the case of tobacco advertising,

the speech is controversial and a case for consumer warnings can be made, the choice between local and national regulation becomes critical for two reasons. First, a national communications policy is far more likely to result in the efficient and effective transmission of the regulatory warning message. Second, a national policy is necessary to protect the controversial speech from strangulation at the hands of thousands of hostile local regulators.

The most dramatic example of the importance of the choice between national and local regulatory policy in the First Amendment area is the sad history of the nation's struggle to draw unregistered voters into the democratic process. For years, a patchwork of local regulations governing voter registration has made it impossible to mount an efficient nationwide drive to deal with the failure of millions of Americans to vote. The lack of uniform rules makes it impossible to craft a uniform national message that would effectively reach the target population. Moreover, the sad fact is that the power of local regulators made it possible for the unscrupulous to make rules designed to prevent people from registering. The drastic expedient of the Voting Rights Act, with its serious implications for federalism, was precipitated by the unfortunate decision to leave voter registration to local, rather than national, regulatory policy.

Similarly, the area of libelous speech directed at public figures was initially left to local regulation through the mechanism of traditional tort law. However, the lack of uniform

national standards rendered it increasingly difficult for political speakers to reach a national free market in ideas. Moreover, as the facts of New York Times v. Sullivan, 376 U.S. 254 (1964) demonstrate, local officials with local regulatory power over controversial speech will inevitably abuse that power in an effort to censor unpopular speech. Thus, while the constitutionalization of the law of libel may be viewed in many ways, at bottom it was a shift from local to national regulatory control in an area of controversial speech. See also Farmer's Union v. WDAY, Inc., 360 U.S. 525 (1959) (pre-empting libel actions against broadcasters).

Yet a third example of the recognition of a need for a national regulatory policy in areas of controversial speech was the Supreme Court's decision in Pennsylvania v. Nelson, 350 U.S. 497 (1956), that the Smith Act withdrew from the States the power to prosecute citizens for sedition against the United States. The obvious danger to vigorous expression posed by the prospect of a patchwork of local sedition laws underlay the Supreme Court's reasoning in Nelson and should inform Congress' judgment as to the wisdom of S. 1883.

Finally, the contemporary issue of regulation of the mass media demonstrates the importance of uniform national policies in the area of controversial communications. Where local regulation is likely to inhibit controversial forms of speech, the Court and Congress have recognized the need for a national regulatory policy. For example, in Capital Cities, Inc. v. Crisp, 467 U.S.

691 (1984), the Court declined to permit Oklahoma to bar local cable broadcasters from re-transmitting interstate alcohol advertising because of a recognition that a national communications policy was necessary in the area. Similarly, in City of New York v. FCC, 486 U.S. 57 (1988), the Court unanimously upheld the exclusive right of the FCC to set technical standards for the cable industry, recognizing that a patchwork of local regulations would inhibit the speech process.

If additional regulation of tobacco advertising is warranted, which we believe it is not, the repeated lesson of our regulatory experience is that regulation of controversial speech should be national in scope and uniform in practice. In fact, our 20 year history of national regulation of tobacco advertising has been a success. Measured by consumer awareness of the health hazards associated with smoking, adherence to a uniform, national set of consumer warnings has resulted in an unprecedented level of national awareness of the issue. Measured by consumer reaction, the percentage of Americans who smoke has declined dramatically.

The fact that the current regulatory system is working and working well has made it difficult for proponents of censorship to marshall Congressional support for additional forays into paternalism. If Congress is unpersuaded that additional censorship would be warranted and constitutional, it is an abdication of First Amendment responsibility to abandon a national, uniform communications policy that is working in favor of a standardless delegation of regulatory power over controversial speech to thousands of local governmental units that are certain to enact overlapping, burdensome and inconsistent regulations. In fact, S. 1883 is not aimed at achieving an efficient regulation at all; it is really a sophisticated attempt at achieving through local censorship what opponents of tobacco have been unable to achieve at the national level - the banning of tobacco advertising.

Senator SIMON. Professor Blasi.

Mr. BLASI. Thank you.

If I had been told that I was to debate the meaning of the First Amendment on any other issue in a panel in which three people oppose my point of view and in which two of them are the two best First Amendment lawyers in the country, and one of them is the best and foremost intelligent nonlawyer student of the First Amendment, I would have cried "Foul" and had no part of it.

But I have one big advantage on this issue—they may have all the brain power, but I've got all the law.

I think there can simply be no doubt in light of the recent U.S. Supreme Court decisions, particularly the *Posadas* case, but also the *Fox* case, that if Congress chose, it could prohibit cigarette advertising nationwide.

But that is not the issue before us today. The issue before us today is whether the repeal of the preemption could be challenged as unconstitutional or, alternatively, ought as a matter of sound public policy not to be engaged in because it will result in States passing unconstitutional restrictions on cigarettes. That is even an easier issue. A simple repeal of the congressional law cannot itself violate the Constitution.

I have detailed my reasons for that conclusion in my prepared remarks, and I won't go into them, but I doubt that any constitutional scholar would contest that point.

So the issue really becomes, as Professor Neuborne's testimony suggests, should Congress not repeal the preemption because it fears that if States are given this freedom to regulate advertising, they will pass laws that are unconstitutional.

I think in light of the *Posadas* case and the *Fox* case and the clear trend in the U.S. Supreme Court's decisions relating to commercial speech that it is hard to imagine that any State would pass a law that the U.S. Supreme Court would strike down.

But even that is not the issue before us today. Even if we could be confident that some States or some localities would pass some laws that violate the First Amendment if given the freedom from the repeal, it ordinarily would not be Congress' policy to deal with the situation by taking away State authority altogether.

Look, for example, at attorney advertising. That is an area in which the U.S. Supreme Court on several occasions has indeed struck down restrictions on advertising. The law there is much more favorable to the advertiser's position than it is with regard to products like cigarettes or gambling or alcohol. Even there, Congress does not deal with the problem by rushing in and preempting all State authority to regulate. Congress stays its hand, allows the situation to be handled at the State level, State laws are passed, they are litigated, some are struck down, some are upheld, States retailor their prohibitions of advertising in light of the litigation. That is the normal way we handle these kinds of problems.

So to say that Congress should continue to prohibit State regulation or local regulation because some State regulations might violate the Constitution would be an abnormal response to this problem and one not warranted. And once again let me emphasize that I think it is most unlikely, given the U.S. Supreme Court prece-

dents, that any State law that would be passed on the subject would indeed be unconstitutional.

I would be happy to answer questions.

Senator SIMON. Thank you.

[The prepared statement of Mr. Blasi follows:]

Posadas and the Prohibition of Cigarette Advertising

prepared at the request of the American Medical Association by:

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February 3, 1987

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Posadas and the Prohibition of Cigarette Advertising

In a letter to Kirk B. Johnson, General Counsel, American Medical Association, of March 18, 1986, we stated our opinion that Congress could prohibit all promotional cigarette advertising. Such a legislative ban would not contravene the limited first amendment protection recognized for commercial advertising by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), and its progeny. We have reexamined our conclusions in light of the Supreme Court's recent decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. ___, 106 S.Ct. 2968, decided on July 1, 1986. *Posadas* explicitly confirms our prior conclusions that the first amendment does not confer a constitutional right to advertise such an intrinsically and gravely harmful product:

> Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand . . . to legalization of the product or activity with restrictions on stimulation of its demand on the other hand . . . . To rule out the latter, intermediate kind of response would require more than we find in the First Amendment. 106 S.Ct. at 2979-80.

On its face, this language makes plain that the Supreme Court would sustain a congressional ban on all promotional cigarette advertising.

Not surprisingly, the tobacco industry and its allies seek to minimize the importance of *Posadas*. Most typically, *Posadas* is discounted as "only" a 5-4 decision, as though in some mysterious way a close division deprives Supreme Court opinions of their authoritative character. In fact, however, *Posadas* is not 5-4 but 5-0 on the crucial question here, namely, whether the first amendment prohibits legislative control of the advertising of gravely harmful products. The five-Justice majority categorically affirms the existence of comprehensive legislative power. And neither of the two dissenting opinions in *Posadas* expresses a contrary view. Justice Brennan's dissent insists that the facts of *Posadas* raised no issue involving advertising of harmful products, and it carefully and clearly reserves judgment on that issue. 106 S.Ct. at 2985-86 n.6. Justice Stevens's dissent focuses upon special discrimination and prior restraint issues raised by the facts of *Posadas* that have no relevance to a ban on cigarette advertising. Justice Stevens expressly declines to address the question whether Congress can prohibit the advertising of any product the use or manufacture of which it could prohibit. *Id.* at 2986.

We emphasize that *Posadas* manifested a 5-0 majority in the Court on the existence of legislative power to prohibit advertising of harmful products. This should scarcely be surprising. In all the

various opinions written by the Supreme Court Justices on commercial advertising since 1976, there is no direct support for the proposition that the first amendment entitles a manufacturer or producer to advertise harmful products. And cigarettes are a uniquely harmful product. When used normally and as intended, cigarettes are intrinsically harmful and highly addictive. Cigarette smoking causes grievous harm and results in much pain and suffering for smokers and their families. In fact, smoking is a lethal activity: "[C]igarettes, alone, annually kill more Americans than do all the following together: heroin, cocaine, alcohol, fire, automobiles, homicide, suicide, and AIDS." K. Warner, *Selling Smoke: Cigarette Advertising and Public Health*, p. 98 (American Public Health Ass'n, Oct. 1986). The Constitution of the United States does not confer a license on the tobacco industry to advertise such a product.

I

Posadas's significance is best understood against the background of our March 18th opinion letter. Our letter ran 17 single-spaced pages, and it has been printed as *The First Amendment and Cigarette Advertising*, 256 JAMA 502 (1986). Here it is feasible only to advert briefly to that letter. After summarizing some of the overwhelming medical evidence that cigarette smoking is gravely harmful, *id.* at 502-503, we analyzed the constitutional issues. We observed that a congressional prohibition of all promotional giveaways of cigarettes and cigarette coupons raises no first amendment issue whatever and is unquestionably valid. *Id.* at 503. We then traced the development of the limited constitutional protection for commercial advertising first recognized by the Supreme Court in 1976 through that Court's important decision in 1980 in *Central Hudson*, *supra*. *Central Hudson* set forth the constitutional standard for assessing the validity of legislative prohibitions on commercial advertising. After once again recognizing the "commonsense distinction" between commercial advertising and other forms of speech, 447 U.S. at 562, the Supreme Court articulated a four-pronged test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, [1] it . . . must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest. 447 U.S. at 566.

Since *Central Hudson*, the Court has consistently adhered to this standard. See generally, 256 JAMA at 504-507 (tracing doctrinal development).

Following our analysis of the relevant constitutional principles, we reached two specific conclusions. Each conclusion independently establishes legislative authority to ban cigarette advertising.

1. Deceptive and Misleading Advertising. From the beginning, the Supreme Court's commercial advertising decisions have acknowledged that "much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's

dealing effectively with this problem." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Cigarettes are an intrinsically harmful product, and Congress could reasonably conclude that the effect of the current image-oriented advertising is deceptive and misleading. Not only does this advertising fail adequately to inform segments of the society, particularly young people, of the gravely harmful and enormously addictive nature of smoking, it conceals or minimizes these facts by associating smoking with traditionally young, healthy, athletic and virile activities and by portraying it as wholly "voluntary." In our view Congress has ample basis for a conclusion that cigarette advertising is deceptive and misleading. 256 JAMA at 505-507.

2. Substantial Governmental Purpose. Even were it assumed that cigarette advertising is not deceptive in effect, a congressional ban on cigarette advertising would be valid because it would directly advance a substantial governmental interest. *Central Hudson* explicitly recognized that discouraging product use could constitute a substantial governmental interest, and it is beyond any rational dispute that reducing smoking is a substantial governmental purpose. 256 JAMA at 507-509.

Posadas reaffirms *Central Hudson*. *Posadas* arose out of Puerto Rico's effort to attract tourists by legalizing casino gambling. At issue was the validity of a statutory prohibition that, as applied, prohibited casino advertising directed to local residents that invited them to engage in the now legalized casino gambling. The Puerto Rico courts had interpreted the statutory ban to apply only to advertisements "in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos," but not to advertisements "addressed to tourists . . . [that] may incidentally reach the hands of a resident." 106 S.Ct. at 2973-74. As so construed, the Puerto Rico courts rejected a constitutional attack on the statute.

In an opinion written by Justice Rehnquist, the Supreme Court affirmed. At the outset the Court acknowledged that no claim was made that the advertising was false or deceptive. 106 S.Ct. at 2976. Accordingly, the Court proceeded to examine the statute under the remaining three prongs of the *Central Hudson* test. *Id.*. First, the Court concluded that the legislature had a substantial interest in reducing the demand for casino gambling among its residents in order to avoid such evils as "the increase in local crime, the fostering of prostitution, . . . and the infiltration of organized crime." 106 S.Ct. at 2977. Next, the Court concluded the legislature could reasonably have concluded that the Puerto Rico prohibition directly advanced this goal, because any locally directed advertisements would have increased the demand among local residents for casino gambling. *Id.*

Finally, the Court concluded that the legislature could reasonably have believed that no less intrusive means would effectuate its goal. The Court expressly rejected the argument that the legislature must itself seek to dissuade local residents from gambling by promulgating speech designed to discourage gambling. Rather, that matter was "up to the legis-

lature to decide." 106 S.Ct. at 2978. The legislature could reasonably determine that its own counterspeech would be ineffective because local residents were "already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct." *Id.* In support of this statement the Court cited decisions sustaining bans on cigarette and liquor advertising. In the closing paragraphs of its opinion, the Court rejected the general argument that truthful advertising of lawful activity could never be restricted, as well as a specific vagueness challenge to the Puerto Rican statute. *Id.* at 2979-80.

The next two sections of this letter will demonstrate that even a casual examination of the *Posadas* opinion shows that it is a devastating setback for the tobacco industry's campaign to establish constitutional protection for cigarette advertising.

II.

When *Posadas* was before the Supreme Court, numerous amici urged the Court to declare that "truthful" advertising of lawful activity could never be prohibited to discourage conduct that itself was not prohibited. Some amici simply refused to acknowledge the fact that *Central Hudson* had rejected this precise contention, while others sought to persuade the Court to reverse its earlier holding. Indeed, prior to *Posadas* the tobacco industry had repeatedly sought to associate itself with "lawful-to-sell, lawful-to-advertise" themes in its public attacks on commercial

advertising restrictions.[1] This position was taken in the June 9, 1986 memorandum prepared by the law firm of Covington and Burling. The very first page of this memorandum asserted that the "basic flaw" in prohibiting cigarette advertising is that it "would suppress truthful speech concerning lawful products based solely on the paternalistic fear that consumers might not use the information in ways thought wise by the proponents." Not only is such an assertion plainly inconsistent with *Central Hudson*, it assumes without any basis that the idea of truthful advertising, which the Supreme Court has invoked only in the context of relatively straightforward price and product information, applies to the tobacco industry's image-oriented advertising of an intrinsically and gravely harmful product. Moreover, in principle, this argument requires more, not less, "paternalism," because it insists that to achieve valid public goals the most intrusive legislative action must be taken: the product itself must be suppressed.

In *Posadas* the Court rejected the industry's proposition once again. Indeed, the Court did so in

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[1] See K. Warner, *Selling Smoke*, *supra*, at pp. 88-89:

> The notion that tobacco advertising should be legal because tobacco products are legal products is the fundamental rallying cry of ban opponents. Its apparent appeal is diminished, however, when one considers the nature of the legality of tobacco products. First, use of tobacco products is *not* universally legal. Sale to children is illegal in over three-quarters of the states (with minimum purchase ages varying) . . . .

(Footnote continued on the following page)

the strongest terms:

> In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restric-

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1 *(Continued)*

Second, the legality of tobacco products stems from historical accident and deliberate circumvention of the nation's legal and regulatory apparatus intended to deal with hazardous substances. The historical accident is that tobacco use diffused widely before the hazards of tobacco were well understood. ... [Prohibition] today would be wholly impractical, as it would make criminals out of more than 50 million law-abiding citizens who are physiologically and psychologically dependent on their tobacco products.

Tobacco products are legal today solely because they have been specifically exempted, by legislation or administrative decision, from the regulatory authority of numerous federal agencies mandated to protect the public from hazardous products. In several instances, federal law clearly would require the banning of tobacco product sales were it not for the explicit exemption of these products. For example, federal legislation specifically precludes the Consumer Products Safety Commission from considering the safety of cigarettes, despite the fact that cigarettes are responsible for more deaths than the combination of all of the other products that have come under the Commission's purview....

> tions on advertising.... It would ... surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand... to legalization of the product or activity with restrictions on stimulation of its demand on the other hand.... To rule out the latter, intermediate kind of response would require more than we find in the First Amendment. 106 S.Ct. at 2979-80.

The *Posadas* Court thus reaffirmed "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson*, 447 U.S. at 562. The first amendment does not mandate constitutional protection for eye-catching advertising on billboards and in newspapers and magazines of such lawful but exceedingly dangerous products as guns or knives, or of drugs the use of which has been decriminalized. The Constitution reflects commonsense realities about the political process in a democratic society. The process of legislation is an intensely practical one. It inherently requires trade-offs between health and safety concerns on the one hand, and autonomy and enforcement concerns on the other. No constitutional imperative exists that a legislature must do everything

or nothing at all. In any effort to reduce smoking there is much to commend a decision to prohibit advertising rather than to prohibit manufacturing or use. Cigarettes are highly addictive, and Congress is not required to make criminals out of approximately 56 million current smokers in this country. Moreover, our Prohibition era experience teaches that use and manufacturing prohibitions are likely to be ineffective and they will generate a black market and pervasive illegality, with the enormous moral and social costs that accompany such a development. In addition, product prohibition is an interference with personal freedom vastly more intrusive than a ban on promotional advertising, since in the latter situation those desirous of cigarettes will remain free to obtain them. Yet, an advertising ban would reduce demand and eliminate a pervasive and important public misconception–that is, the belief that the use of a lethal and addictive product enhances a healthy and athletic life style. Elimination of this deceptive and dangerous imagery, particularly when coupled with positive efforts to discourage smoking, is expected to yield measurable benefits, particularly in curtailing smoking among young people.

III

After *Posadas*, there is no basis whatever for the claim that the first amendment requires that a product must be banned before advertising can be restricted. Not surprisingly, therefore, on July 18, 1986, scarcely one month after its earlier memorandum and seventeen days after the *Posadas* decision, Covington and Burling issued a printed Legal Memorandum that omits its earlier "basic flaw" opening. ("C & B *Legal Memorandum*") But this new

memorandum seeks to interpret *Posadas* out of existence. "Distinctions" are posited that have no basis in the *Posadas* opinion. Thus at the outset we are told that the advertising restrictions in *Posadas* were sustained because they were ineffective! "The restrictions at issue in that case were so porous, so lacking in actual substantive effect, that the majority apparently considered it unnecessary to undertake a searching inquiry of the interests purportedly being served or of alternatives that may have been available. . . ." (p. 2) They were "restrictions in name only." (p. 4) But nothing in the Supreme Court's opinion remotely suggests that the restrictions were ineffective, or that they were sustained because the Court so believed. *Posadas* is also said to be distinguishable because casino gambling "has long been illegal in most of the United States and is subject to severe, and obviously constitutional, restrictions in Puerto Rico." (p. 2) But whatever its status elsewhere, casino gambling has been a lawful activity in Puerto Rico since 1948, and the Supreme Court understood that fact quite clearly: "The particular kind of commercial speech at issue here . . . concerns a lawful activity." 106 S.Ct. at 2976. C & B's other efforts to "distinguish" *Posadas* are equally strained.[2]

This lengthy discussion of one recent effort to

[2]The C & B *Legal Memorandum* states that "one can readily understand the majority's decision in *Posadas* to tread gingerly in considering a challenge to economic development legislation enacted by the Commonwealth of Puerto Rico, with its 'unique cultural and legal history' (54 U.S.L.W. at 4959 n.6) and its politically delicate relationship to the United States." (p. 2) These "facts" are nowhere

(Footnote continued on the following page)

"distinguish" *Posadas* is important because the overall aim of the new strategy seems quite obvious: ignore or discount *Posadas* to the maximum extent possible, and try to refocus all attention back on

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2 *(Continued)*

mentioned in the opinion on the merits. There is no mention whatever of the Court's concern with Puerto Rico's "politically delicate relationship to the United States," and unless psychoanalysis is to spread into an unaccustomed field, we do not discuss it further. The Court's footnote reference to "unique cultural and legal history," appears only in reference to a technical jurisdictional point: whether the Supreme Court must defer to the Puerto Rico courts on the interpretation of the Puerto Rico statute–precisely what the Court does with respect to state courts on state law. In sum, nothing in the Court's opinion supports the implicit suggestion in the C & B memorandum that the first amendment applies with diminished force in Puerto Rico.

At the end of the *Legal Memorandum*, the opposite tack is taken. *Posadas* can't mean what it says, otherwise it would go too far (and of course a restriction of cigarette advertising would be valid). For example, Covington and Burling argues that, taken seriously, the Court's opinion would permit outlawing "advertising for abortion and abortion counseling services," as well as "banning the advertisement or display of contraceptives." *Id.* at p. 24. This assertion is completely mistaken. Speaking to this exact point, and referring to the very advertising cases cited in the C & B memorandum, the *Posadas* Court said, "In [those cases], the underlying conduct that was the subject of the advertising restriction was constitutionally protected. . . . [But Puerto Rico] surely could have prohibited casino gambling by the residents of Puerto Rico altogether." 106 S.Ct. at 2979.

Central Hudson. Once that is accomplished, brush aside any issue of misleading advertising, and then concentrate all attention on the final two prongs of *Central Hudson*. If successful, this strategy will permit a complete return to the pre-*Posadas* argument that a ban on cigarette advertising cannot satisfy *Central Hudson* because it would not directly advance the legislative goal and it would be unnecessarily restrictive. Compare July 17, 1986 C & B *Legal Memorandum*, pp. 12-19, with its prior memorandum of June 9, 1986, pp. 14-22. In our March 18, 1986 opinion letter we demonstrated in some detail how a ban on advertising would indeed satisfy the *Central Hudson* criteria. 256 JAMA at 507-509. That analysis need not be repeated here. Instead, we wish to emphasize the special importance of *Posadas* in undercutting the industry's purported "reliance" upon the last two prongs of *Central Hudson*.

First. *Posadas* makes plain that a legislative prohibition on cigarette advertising is not unnecessarily restrictive, and thus that Congress need not rely on the supposed adequacy of counterspeech to discourage smoking:

> Appellant contends, however, that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it. We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino

gambling as a restriction on advertising. 106 S.Ct. at 2978.

In support of this position, the Court goes on to cite with approval decisions upholding both print and television bans of cigarette advertising and liquor advertising. In particular, the Court quotes from *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972). There, in sustaining a congressional ban on television advertising of cigarettes, the district court said "Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking." The *Posadas* Court's reaffirmation of *Capital Broadcasting*, which was decided prior to the Supreme Court's commercial speech cases, and its citation with approval to cases restricting printed liquor advertising are important. The Court quite plainly believes that *Capital Broadcasting* is fully consistent with current free speech doctrine, and that the principle of that decision is not confined to television advertising.

We think it clear the Constitution does not require that the government match by counterspeech the two billion dollars a year spent by the industry on advertising and other forms of promotion. Nor is Congress restricted only to the option of requiring still more warnings in cigarette advertising. Particularly in view of past experience with the impact of legally required counterspeech, Congress could conclude that further warnings will not sufficiently reduce smoking. Large segments of the population will remain confused over the actual extent of the danger presented by smoking, as we pointed out, 256 JAMA at 506-507. See also K. Warner, *Selling Smoke*, *supra*, at pp. 35-42. And as *Posadas* makes plain many others, who

are "already aware of the risks ... would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct." *Posadas*, *supra*, 106 S.Ct. at 2978. Congress could reasonably conclude that young adolescents are vulnerable to both kinds of risks.

Second. *Posadas* completely forecloses the industry's other argument that banning cigarette advertising is invalid on the theory that it will not reduce aggregate consumption because the impact of cigarette advertising is only on brand competition. See C & B *Legal Memorandum*, pp. 14-17. Of course, the factual basis of the industry's position that advertising has no effect on the aggregate level of smoking is hotly contested. "...[T]he preponderance of the evidence of all types supports the existence of a relationship between promotion and cigarette consumption." K. Warner, *Selling Smoke*, *supra*, at p. 84. But the important point is that *Posadas* confirms our view that the limited protection accorded by the first amendment to commercial advertising does not disable Congress from acting because of any supposed empirical uncertainty about the precise correlation between advertising and demand:

> The last two steps of the *Central Hudson* analysis basically involve a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. Step three asks the question whether the challenged restrictions on commercial speech "directly advance" the government's asserted interest. In the instant case, the answer to this question is clearly "yes." The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue

here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view. See *Central Hudson*, *supra*, 447 U.S., at 569, 100 S.Ct., at 2353. ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales"); cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509, 101 S.Ct. 2882, 2893, 69 L.Ed.2d 800 (1981) (plurality opinion of WHITE, J.) (finding third prong of *Central Hudson* test satisfied where legislative judgment "not manifestly unreasonable"). 106 S.Ct. at 2977.

The Court makes quite plain that it is the industry, not Congress, that bears the burden of demonstrating that no reasonable person could conclude that the two billion dollars spent each year on cigarette advertising and promotion has no impact on aggregate levels of consumption. We are confident that the industry cannot shoulder any such burden.

No one supposes that the elimination of all commercial advertising for cigarettes will eliminate all cigarette consumption. It must be remembered, however, that the central beneficiaries of such a ban will be future generations. For them (as well as for current smokers) an advertising ban will serve to delegitimize smoking as an activity, and it will warn smokers that Congress really does believe that smoking is a gravely harmful activity. And of course any advertising ban will not stand alone in that respect,

given the increasing efforts by public authorities and others to convince the younger generation not to smoke. In sum, an advertising ban is only a part, but an important part, of an overall campaign to curb smoking in our society.

IV.

Posadas wholly eviscerates the first amendment contentions of the tobacco industry and its allies. After initially seeking to minimize *Posadas*, Covington and Burling ends its memorandum warning that the "implications" of *Posadas* are "frightening and unwarranted." C & B *Legal Memorandum*, p. 23. This warning is entirely misplaced. *Posadas* recognizes that whether an activity is lawful or not cannot be constitutionally decisive, that the first amendment no less than commonsense permits recognition of a difference between advertising toothpaste and advertising a uniquely harmful product. Cigarettes are not toothpaste; they are a uniquely harmful product because they cause grave harm when used normally and as intended. According to the World Health Organization, cigarette smoking is responsible for one million deaths yearly throughout the world. *N.Y. Times*, Jan. 16, 1986, p. 16. *Posadas* fully confirms our prior opinion that the Constitution of the United States does not confer on anyone a right to promote or advertise such a lethal and addictive product.

The First Amendment and Cigarette Advertising

The American Medical Association has long supported a ban on promotional advertising. Late last year, it retained two prominent constitutional law authorities to prepare an opinion on the constitutionality of federal legislation banning promotional advertising.

March 18, 1986

Kirk B. Johnson, Esq
General Counsel
American Medical Association
535 N Dearborn
Chicago, IL 60610

Dear Mr Johnson:

Since 1965, Congress has displayed ever mounting concern with the health dangers of cigarette smoking. This concern has led to increasingly stringent regulation of cigarette labeling and advertising, and to federally sponsored research, studies, and public information about the potential health consequences of smoking. 15 U.S.C. §§ 1331-41. See H. Rep. No. 98-805, pp. 7-12, accompanying P.L. 98-474, the Comprehensive Smoking Education Act, 1984 U.S. Code Congr. and Adm. News, p. 3718, 3720-25 (summarizing evolution of Congressional action). Federal regulation of cigarette labeling and advertising now includes not only the Surgeon General's Warnings, 15 U.S.C. § 1333, but a complete prohibition of promotional advertising on radio and television, id. at § 1335. The American Medical Association proposes to prohibit all forms of promotional advertising. In addition to the current radio and television ban, promotional advertising in magazines, billboards and movies, as well as promotional giveaways through sampling distributions and coupon programs, would be prohib Presumably, retail signs indicating the availability cigarettes would be permitted. On the basis of the exis data, you asked our opinion on the constitutionality of su promotional advertising ban, if enacted. We believe such legislation would be entirely consistent with fed constitutional requirements.

The existing data provide a substantial basis for sev important factual conclusions that can only be br summarized here. Most important, medical research dem strates that cigarette smoking is exceedingly and uniq dangerous to health. See, for example, the special issu the *New York State Journal of Medicine*, entitled " World Cigarette Pandemic," Vol. 85, No. 7 (July 1985). also 15 U.S.C. § 1333(a) (Congressional findings). Inc cigarettes are lethal. Each year approximately 25(Americans die of cigarette related diseases, and a recer issued report of the World Health Organization puts number at 1 000 000 persons yearly for the world whole. N.Y. Times, Thurs., Jan. 16, 1986, p. 16. Ciga associated diseases drastically shorten the normal life of many persons, and they are the cause of incalculable and suffering. Wholly apart from the human tragedy befalls the smoking victim, and his or her family friends, cigarette smoking has a massive social cost. example, in the United States the medical care and productivity costs associated with cigarette smoking approximately 65 billion dollars per year.

The harms caused by cigarette smoking are not the r of product "abuse" or "misuse." No safe use for this pro exists; every cigarette smoked is intrinsically harmf health. More starkly put, when used normally an intended, cigarettes cause grave harm. Moreover, accor

From the Columbia University School of Law, New York. For further information and reprints, write to the Office of the General Counsel, American Medical Association, 535 N Dearborn St, Chicago, IL 60610

to the National Institute on Drug Abuse, the nicotine in tobacco is "a powerfully addictive drug," one believed to be from "six to eight times more addictive than alcohol."

Each year the tobacco industry spends an enormous sum to attract new users, retain current smokers, increase current consumption, and generate favorable long-term attitudes towards smoking. Indeed, according to the Federal Trade Commission, "cigarettes are the most heavily advertised product in America." In 1983, the industry spent approximately two billion dollars on advertising and promotion. In significant measure, this advertising is aimed simply at replenishing the large number of smokers annually lost to the industry. In addition to those smokers who die, approximately 1.5 million persons quit smoking each year because of health fears or social pressures. There are now relatively few adult converts to smoking. For most cigarette users, smoking begins early; indeed, of current smokers, about 60 percent began by the very young age of thirteen or fourteen. Tobacco industry advertising heavily stresses adolescent-oriented themes and images (motorcycling, surfing, athletics, and other glamorous activities), and adolescent-oriented contexts. Sports, entertainment and sexually explicit magazines, sporting events and rock concerts, and advertising placed in movies, are favorite advertising contexts. Existing studies indicate that the industry's sustained effort to associate smoking with a healthy and vigorous life-style succeeds in accomplishing the industry's purpose: maintaining consumption levels.

Efforts to discourage smoking through such methods as school information programs and the standard Surgeon General's "warnings" have proved insufficiently effective, particularly among the young. The reasons seem plain. The warnings are frequently "not seen," and in any event their import is not comprehended. The overriding fact is that many smoking adults and, more importantly, children and young adolescents, are not in any position to make a reasoned and informed judgment about smoking. They lack adequate comprehension of the significant health dangers inherent in smoking. In fact, they are misinformed, confused, or wholly ignorant about such matters as the nature and range of smoking related diseases, the health consequences of low tar and smokeless tobacco, the level of "safe" smoking, and their future ability to quit this highly addictive product. Moreover, by repetitive and unrelenting association of smoking with images of healthy activities, cigarette advertising effectively overcomes any health based fears. For many, the mere existence of widespread promotional advertising implies that the practice of smoking "can't be that bad."

More effective steps to discourage smoking are necessary. In that regard it is highly probable that the demand for cigarettes would fall appreciably were promotional advertising to be prohibited in an effective manner. In any event, such a ban would retard any increase in consumption. Indeed, in a letter to the then Secretary of Health and Human Services, Margaret Heckler, the National Advisory Council on Drug Abuse characterized such a prohibition as "the single most important step this society can take in its goal of preventing smoking among its people—in particular its young people."

In our opinion, a Congressional ban on promotional advertising of cigarettes would not offend the first amendment. Supreme Court decisions do not require constitutional protection for the image-oriented and highly seductive advertising of such an exceedingly harmful and strongly addictive product, particularly when that advertising is directed to a largely young and in any event badly confused and misinformed public. Even assuming that such advertising is entitled to the full range of protection accorded commercial advertising, the Supreme Court's well known decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), makes plain that this promotional advertising can be prohibited. Under *Central Hudson*, false, deceptive and misleading advertising can be prohibited, and even non-deceptive advertising can be banned where necessary to accomplish a substantial governmental purpose. A powerful, and to our minds convincing, case can be made that the industry's current advertising is inherently deceptive and misleading: this advertising fails to disclose adequately the lethal and addictive qualities of the product; indeed, whether or not by conscious design, its effect is to allay any such fears, particularly among poorly informed and highly vulnerable young adolescents. Thus not only are the conditions for rational and informed choice lacking, they have been completely subverted. Moreover, even were this promotional advertising to escape condemnation as deceptive and misleading, it is subject to prohibition. Prohibitive action would directly promote the clear and substantial public interest in reducing cigarette consumption, or at least retarding its increase. Short of an outright ban on the manufacture and use of cigarettes, no plausible alternative is available for reducing the amount of smoking. In the sections of this opinion letter that follow we state in more detail the legal basis for our conclusion.

I.

It is unlikely that anyone will seriously contend that Congress lacks power to prohibit the manufacturing or use of cigarettes. Congressional legislation of that nature would be readily sustainable under the commerce clause, and it would not offend the substantive prohibitions of the due process clause. It bears emphasis that this legislation could not be successfully attacked on the grounds that it is "paternalistic." Even assuming that this term possesses a sufficiently coherent and uncontroversial core meaning, and that it could be applied to an activity that causes so much pain, suffering and death and has such enormous social costs, no general constitutional prohibition exists against paternalistic regulation. Any suggestion to the contrary would necessarily resurrect the discredited doctrine of *Lochner v. New York*, 198 U.S. 45, 61 (1905). As Justice Rehnquist observed for the Court at the end of the last term, *Lochner's* "day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. ___, ___ (1985), 105 S.Ct. 3180, 3190. And the Supreme Court has repeatedly rejected due process challenges to statutes on the basis of health concerns far less compelling than here. See, for example, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The foregoing cases make plain that there is no constitutional difficulty whatever in the suppression of one form of promotional advertising, namely, the prohibition of promotional giveaways of cigarettes and cigarette coupons. Unlike use of contraceptives, cigarette use has no constitutional status; and cigarette manufacture, distribution, and use can be regulated or prohibited as a means of discouraging smoking. Compare *Carey v. Population Services International*, 431 U.S. 678 (1977) (invalidating prohibitions on the sale and advertising display of contraceptives). Recognition of Congressional power to forbid promotional giveaways can have significant consequences. These giveaways play an increasingly important marketing role. Between 1980 and 1983, the tobacco industry's expenditures on distribution and free-sample programs increased significantly. Frequently, these giveaways occur at locations with high concentrations of young people, such as sporting events and rock concerts.

This brings us to the question of the validity of a general

prohibition on promotional cigarette advertising. Quite clearly, advertising an unlawful product can be prohibited. *Central Hudson, supra,* 447 U.S. at 563-64. Since Congressional power to prohibit manufacture or use of cigarettes is incontestable, the initial important question is whether Congress must take one of those two steps in order to enact a valid ban on promotional advertising—that is, whether Congress is required by the first amendment to take the greater step of prohibiting conduct in order to take the lesser step of discouraging conduct by banning promotional advertising. This is the position of the tobacco industry, and of its advertising industry allies. If true, this result is a substantial defeat for public health advocates, since the industry appears quite confident of its ability to defeat any proposal that would prohibit either the use or manufacturing of cigarettes.

Viewed in general terms, the tobacco industry's position possesses little intuitive appeal. As a matter of social policy, there is much to commend a choice of prohibition of advertising over prohibition of manufacturing or use. Currently, there are about 50 million smokers in this country. The Prohibition era experience teaches that a use prohibition is not only likely to be totally ineffective, but it will generate a black market and pervasive illegality, with the enormous moral and social costs that accompany such a development. Perhaps a manufacturing prohibition would be more successful. But the important point is that any form of outright prohibition, albeit constitutional, entails enforcement problems of great magnitude. Moreover, product prohibition is a vastly more intrusive interference with personal freedom than is a ban on promotional advertising. The latter leaves unimpaired a wide range of individual choice, since those desirous of cigarettes will remain free to obtain them. Yet, the ban would eliminate industry efforts to establish an important "false consciousness"—that is, the belief that the use of a lethal and addictive product enhances a healthy and athletic life-style. Elimination of this deceptive and dangerous imagery is expected to yield enormous benefits, particularly in curtailing smoking among young people.

To our eyes, a prohibition of promotional advertising is a defensible accommodation of the various interests at stake. We confess, therefore, that it is somewhat startling to think that the limited federal constitutional protection accorded commercial advertising prohibits such an accommodation. We thus turn in the next section to the general principles developed by the Supreme Court in the area of commercial advertising.

II.

For many years, commercial advertising was not thought to be within the ambit of the "speech" protected by the first amendment. *Valentine v. Chrestensen,* 316 U.S. 52 (1942). During this period advertising bans designed to promote public health objectives readily passed constitutional muster. *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489-90 (1955). And there was no suggestion that any constitutional difficulty inhered in the Federal Trade Commission's jurisdiction over "unfair or deceptive acts or practices . . . in commerce." 15 U.S.C. § 45(a)(1). The unprotected nature of commercial advertising was the accepted doctrine when, in 1972, the Supreme Court affirmed without opinion a district court judgment that upheld the federal statutory ban on cigarette advertising on the electronic media. *Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 582 (D.D.C. 1971), aff'd. 405 U.S. 1000 (1972). Perhaps the result seemed particularly evident because, in addition to the disfavored status of commercial speech, Congress was thought to be little inhibited by first amendment concerns when regulating the broadcast media. *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 (1969). But little weight can now be placed on *Capital Broadcasting.* Not only does the first amendment embrace commercial speech, but it is now seen as imposing some constraints on congressional power over the broadcast media. *FCC v. League of Women Voters of California,* 468 U.S. ___, 104 S.Ct. 3574 (1984). Thus, it now seems plain that even the regulation of commercial advertising on the broadcast media implicates first amendment concerns. See the discussion in *The Supreme Court, Leading Cases,* 99 Harv. L. Rev. 120, 199-200 (1985) (discussing television advertising by lawyers). Most importantly, the AMA's proposed ban is not confined to the electronic media. Accordingly, the validity of a Congressional ban on the promotional advertising must be considered *res nova,* and it is best analyzed free of any significant presumption in favor of special Congressional prerogatives to regulate the broadcast media.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.,* 425 U.S. 748 (1976), the Supreme Court first squarely held that commercial advertising is protected by the first amendment. Since that time the Court has handed down less than a dozen opinions, many of which are concerned with advertising by lawyers. A detailed examination of the various decisions would be more tedious than illuminating. See generally the summary in J. Nowak, R. Rotunda and J. Young, *Constitutional Law,* 923-43 (2d ed. 1983). The Court's opinions do not exhibit perfect consistency, at least in tone and emphasis. For example, in describing the constitutional status of commercial speech, one opinion refers to its "limited measure of protection commensurate with its subordinate position in the scale of [f]irst [a]mendment values," *Ohralik v. Ohio State Bar,* 436 U.S. 447, 456 (1978), while another refers to its "qualified, but nonetheless substantial protection," *Bolger v. Youngs Drug Products,* 463 U.S. 60, 68 (1983). Such discrepancies are characteristic of any formative doctrinal period during which the Court struggles with the implications of a significant doctrinal departure. But it is important to recognize that from the very beginning there have been important areas of doctrinal agreement. The Court has always recognized "the 'common-sense distinction' between speech proposing a commercial transaction, which occurs in an area traditionally subject to regulation, and other varieties of speech." *Central Hudson, supra,* 447 U.S. at 561. This understanding has meant that commercial speech is entitled to "less protection" than other forms of speech, and that misleading or deceptive commercial speech is entitled to no protection. E.g. *Friedman v. Rogers,* 440 U.S. 1, 9-10 (1979).

Until *Central Hudson,* the precise nature of the protection accorded commercial advertising was unclear. The Court's earliest decisions did supply a basis for the categorical proposition that truthful promotional advertising of lawful products or activities could not be prohibited. In *Virginia Pharmacy,* for example, the Court said, 425 U.S. at 770:

> an alternative to this highly paternalistic approach . . . is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

See also, for example, *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 96-97 (1977); L. Tribe, *Constitutional Law* 12-15, at p. 654 (1978). 12-15 at 654 (1978). Quite typically this view forms the underpinning for the assertion that a ban on promotional cigarette advertising is invalid. See, for example, Nowak, et al., *supra,* at 933-34; Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertising,* 85 Colum. L. Rev. 632, 641-43, 646-51 (1985).[1]

We note that this anti-paternalism theme emerges in contexts far removed from cigarette advertising. As the Court said in *Central Hudson*, *supra* at 563, "The [f]irst [a]mendment's concern for commercial speech is based on the informational function of advertising." On this rationale, the "absolute-protection-for-truthful-advertising" theme has some attraction in the context of informational advertising about price and product. See *Virginia Pharmacy*, *supra*; *Linmark*, *supra*. But it takes a long step to apply this theme to the image advertising of dangerous products about which there is considerable public confusion. To our minds, it is implausible that the first amendment mandates cigarette-like advertising on billboards and in newspapers and magazines of such lawful but exceedingly dangerous products as guns or knives. It is even more implausible that legislative de-criminalization of the use of various drugs automatically carries with it a right to unlimited billboard advertising, complete with the stimulating and eye-catching images of cowboys, mountain climbers, athletes, and other macho figures, but perhaps accompanied by a side warning that "use of this product may be dangerous to your health." But see note, p. 18, *infra*. If *Virginia Pharmacy* requires such results, grave doubt exists as to the wisdom of "the substantial extension of traditional free-speech doctrine," *Friedman*, *supra* 440 U.S. at 10 n.9, involved in bringing commercial advertising within the ambit of the first amendment.

Wholly apart from disputable application of "absolute protection" arguments to image advertising, the absolutist view has little to commend it. In principle, it requires more, not less, "paternalism," because it insists that, to achieve valid public goals, the product itself must be suppressed. The legislature is disabled from following its typical *modus operandi*—enacting legislation that reflects rational trade-offs between health and other values, such as personal choice, or between health and enforcement concerns. Moreover, the argument that truthful advertising of lawful products can never be prohibited rests on a fundamental category mistake: it seeks to apply without limit or qualification constitutional principles that were developed for other, quite different, first amendment contexts. In so doing, the argument ignores the "commonsense" differences between commercial speech and other forms of speech.

The Court's landmark decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, *supra*, provides a detailed and comprehensive statement of current constitutional doctrine governing commercial advertising and places the aforementioned concern about paternalism in proper perspective. At issue in *Central Hudson* was the validity of a regulatory ban on promotional advertising of energy consumption, an admittedly lawful conduct. For Justices Blackmun and Brennan the lawful character of the underlying conduct was the end of the matter, and the ban should have been invalidated. Id., 447 U.S. at 573-574. However, the Court adopted a different approach, *id.* at 566:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, [1] it . . . must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

The Court has repeatedly adhered to the *Central Hudson* standard. E.g. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68-69 (1983). In *Zauderer v. Office of Disciplinary Counsel*, 473 U.S. ___, ___ (1985), 105 S.Ct. 2265, 2275, the Court, citing *Central Hudson*, remarked: "Commercial speech that is not false or deceptive and does not concern unlawful activities, . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Accordingly, we proceed within the basic framework established by *Central Hudson*.[2] In Part III, we conclude that current cigarette promotional advertising could be forbidden as deceptive; in Part IV, we conclude that, in any event, an advertising ban would be valid because it would directly advance the substantial public interest in health.

III.

Commonsense distinctions exist not only between commercial advertising and other forms of speech but within the area of commercial advertising itself. *Virginia Pharmacy* invalidated restrictions on the truthful advertising of the price of prescription drugs. In similar fashion, the Court has invalidated "blanket bans on price advertising by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice." *Zauderer v. Office of Disciplinary Council*, *supra*, 105 S.Ct. at 2275. "These statements were self-contained and self-explanatory," *Friedman v. Rogers*, *supra*, 440 U.S. at 12, and they conveyed relatively concrete and verifiable price and product information. *Friedman v. Rogers*, *supra* at 10; *Zauderer*, *supra* at 2279-81. Not only was there little plausible danger of deception; any such danger could be adequately alleviated by disclosure. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. at 2281-83. Accordingly, the Court rejected arguments that this kind of advertising is inherently misleading, or that the difficulty in sorting out false advertising justified a prophylactic ban. See, in particular, *Zauderer*, *supra*, 105 S.Ct. at 2278-81. For the Court, this kind of advertising falls squarely within the core constitutional rationale for protecting commercial speech: protection of the "informational function of advertising." *Central Hudson*, 447 U.S. at 563.

But current cigarette advertising, appealing as it does to subconscious and nonrational associations simply to sell a product, has little or no such "informational function." This is centrally true even of those advertisements with some recognizable informational content, such as that relating to tar content. Like other advertisements, tobacco advertisements are the product of careful and extensive marketing research, and they are designed to exploit the psychological

[1]It is also said that suppression of truthful advertising amounts to impermissible "indirect" conduct regulation. E.g. *Central Hudson*, *supra*, 447 U.S. at 574-75 (concurring opinion); *The First Amendment and Legislative Bans of Liquor and Cigarette Advertising*, 85 Colum. L. Rev. 632, 642 (1985). But much legislation—whether of a regulatory, spending or tax character—works to achieve public goals indirectly, and the "indirect" nature of such regulation has never been the basis for objection. *Williamson v. Lee Optical Company*, *supra*, 348 U.S. at 487, makes that plain. On analysis, this "regulatory directness" argument dissolves entirely into one that turns on the "special" nature of speech.

[2]Currently pending before the Supreme Court is an appeal from the Supreme Court of Puerto Rico in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, No. 84-1903, which may shed more light on this subject. In that case, several amicii have urged the Supreme Court to abandon *Central Hudson*, and to declare in a categorical manner that the truthful advertising of lawful activity is constitutionally protected. That result seems unlikely.

vulnerabilities of their targets, particularly young persons. W. Meyers, *The Image-Makers: Power and Persuasion on Madison Avenue* 17-18, 31 (Times Books 1984).[3]

In *Virginia Pharmacy*, the Court noted that "much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state's dealing effectively with this problem." *Virginia Pharmacy*, *supra*, 425 U.S. at 771; *Friedman v. Rogers*, *supra*, 440 U.S. at 11-14. While the Court's opinions do not support a conclusion that image-advertising is wholly beyond the first amendment, they do indicate a judicial awareness of image advertisements' lack of informational content and of its capacity to deceive through "ill-defined associations . . . with price and quality information." See, for example, *Friedman v. Rogers*, *supra*, 440 U.S. at 12-13 (sustaining a ban on practicing optometry under a trade name).

The case for prohibition of cigarette advertising as "deceptive" does not seek to prohibit "the use of pictures or illustrations in connection with [product] advertising . . . simply on the strength of the *general* argument that the visual content of the advertisements may, under some circumstances, be deceptive or misleading." *Zauderer*, *supra*, 105 S.Ct. at 2281 (emphasis supplied). Nor does it rest on the fact that, like automobile and toothpaste advertisements, cigarette advertisements identify product use with a glamorous and exciting life. Cigarette advertising is not an area of general, unfocused, speculative concern, as the three decades of Congressional regulation and the numerous studies by the FTC and other bodies attest. The harm produced by the normal and intended use of this product is almost beyond description. Yet, no cigarette advertising gives adequate warning of the wide range of serious and life threatening diseases induced by the ordinary use of the product. Quite to the contrary, the effect of this advertising is to conceal or to minimize these facts. Smoking is portrayed as not harmful, by associating it with traditionally young, healthy, athletic, and virile activities. W. Meyers, *supra* at 31 ("reassurance" advertising). Moreover, no cigarette advertising gives even the remotest suggestion that cigarettes are strongly addictive. Quite to the contrary, smoking is portrayed as not the product of addiction, but rather as an exciting activity that, like mountain climbing, is freely undertaken by "real" men and women. W. Meyers, *supra* at 17.

Given what the cigarette advertising does portray, what it fails to say, and the vast public ignorance of the dangers and addictive quality of smoking, particularly among young persons, it is plain to us that this kind of advertising can be proscribed as deceptive and misleading. We need not examine the evidence of an "intent" by the tobacco industry to disguise the health consequences of smoking. Compare White, *The Intentional Exploitation of Man's Known Weaknesses*, 9 Houston L. Rev. 889, 904-907 (1972) (cigarette harms are intentionally caused because advertising designed to exploit known human weaknesses). See also W. Meyers, *supra* at 31. What is crucial is the effect of this advertising. Commercial advertising can be prohibited where it is far "more likely to deceive the public than to inform it." *Central Hudson*, *supra*, 447 U.S. at 563. See also *Friedman v. Rodgers*, *supra*. Thus in Zauderer, the Court repeatedly cited with approval the FTC's traditional jurisdiction over "unfair or deceptive acts or practices in . . . commerce," *Zauderer*, *supra* 105 S.Ct. at 2279, 2281, without suggesting that *Virginia Pharmacy* disturbed the settled rule that the FTC need show only that the advertising has a deceptive effect. As the Supreme Court said long ago in *F.T.C. v. Algoma Co.*, 291 U.S. 67, 81 (1933):

> Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. . . . That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive.

See generally, Kintner, *A Primer on the Law of Deceptive Practices*, 98-99 (1976).

In recognizing the deceptive nature of cigarette advertising we reach no novel conclusion.[4] The FTC long ago reached the same conclusion in its efforts to adopt a trade regulation rule governing cigarette advertising. See *Trade Regulation for the Prevention of Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule* 99-113 (1964). So did the FCC in imposing the fairness doctrine requirements on cigarette advertisements. *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1098-1099 (D.C. Cir. 1968), *cert. den.* 396 U.S. 842 (1969). Moreover, concern over the deceptive effect of current cigarette advertising is a foundation for much current Congressional regulation that "seeks to assist the public to make an informed decision about whether or not to smoke." *House Rep.*, *supra* p. 1, at 12. See 15 U.S.C. § 1331(1).

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[3]Of course, this is not to suggest that image-advertising is other than simply commercial advertising, and thus entitled to *greater* constitutional protection than is accorded price and product advertising. But see Note, *supra* 85 Colum. L. Rev. at 650-51. Any such result would be wholly perverse. Cigarette advertising does not even purport to inform the public about matters of public debate, even though that fact alone would not establish the existence of noncommercial speech. *Central Hudson*, *supra*, 447 U.S. at 562-63. What is more, like other forms of image advertising, cigarette advertising is universally acknowledged to be no more than the advertisement of specific products for profit. Thus, at best, image advertising is entitled to no more constitutional protection than that generally accorded commercial advertising. *Bolger v. Youngs Products Corp.*, 463 U.S. 60, 66-68 (1983), makes that clear beyond rational contradiction. See also *Zauderer*, *supra* 105 S.Ct. at 2275, and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. ____ (1986) (plurality opinion), 54 U.S.L.W. 4149, 4151 (Feb. 25, 1986).

[4]In the context of sustaining a ban on promotional liquor advertising, two federal appeals courts have laconically rejected a similar argument. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 500 n.9 (10th Cir. 1983), rev'd on other grounds sub nom. *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984); *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), cert. den. 104 S.Ct. 3553 (1984). One can advance distinctions here, in terms of the two products and their advertising. But to us the two opinions cannot be treated as authoritative in any event. *Crisp* treats the deception issue in passing, 699 F.2d at 499-500 nn.7-9; it simply assumes that image advertising cannot be "deceptive," a plainly incorrect position both legally and factually. The *en banc* court in *Dunagin* did not discuss the issue, but seemingly it endorsed the views of an earlier panel opinion on this point. 718 F.2d at 747. Without analysis the panel assumed that image advertising was fully embraced by the first amendment, and without evidence it stated that corrective advertising would suffice to offset any deceptive quality in the advertising. *Lamar Outdoor Advt. v. Mississippi State Tax Comm'n*, 701 F.2d 314, at 323-25. The *Lamar* panel also rejected the view that the dangerous nature of the advertised product justified the prohibition.

Thus the issue narrows to whether, as contended by some commentators, see Note, 85 Columbia L. Rev. at 652-54, this is a situation where more of the traditional first amendment remedy of counter-speech or further disclosure is likely to be effective. Existing data show this to be highly unlikely. Considerable evidence exists that the Surgeon General's warnings are not read, or at best they are simply glanced at. Moreover, the visually attractive cigarette advertising affirmatively associates smoking with healthy activities and thereby effectively neutralize what little force actually remains in the Surgeon General's warnings. These facts explain why the most recent Congressional legislation has required rotation of the warnings. 15 U.S.C. § 1333(c). However, this change cannot solve the basic problem. Wholly apart from the capacity of the advertising to overcome the warnings, the warnings can make little impact on a public badly informed or wholly ignorant about the risks involved in smoking; many people continue to operate on completely mistaken impressions about "safe" smoking. (For example, fully half the public does not know that cigarette smoking increases the risk of heart attacks, or that, by increasing consumption, low-tar cigarettes may be a greater danger to health than other cigarettes.) In particular, adolescents lack an adequate comprehension of the dangers of cigarette smoking as well as of their ability to quit smoking at some future time.

Quite plainly, current cigarette advertising is not "advertising [that] communicates only an incomplete version of the relevant facts, [but] the [f]irst [a]mendment presumes that some accurate information is better than no information at all." *Central Hudson, supra*, 447 U.S. at 562. This is because in the context of current cigarette advertising the conditions for informed rational choice, particularly among young persons, about the use of a lethal product are wholly lacking; indeed, they have been subverted. See Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 Harvard L. Rev. 809, 812-819 (1986) (individuals, particularly minors, do not sufficiently understand dangers, particularly given the tobacco industry advertising). And the Supreme Court has long ago shown special solicitude for the protection of young persons from exploitative commercial advertising. *F.T.C. v. R.F. Keppel & Bro.*, 291 U.S. 304, 313 (1934).

Our analysis has focused upon current, image-oriented, cigarette advertising. It might be objected that even if correct, the analysis could not justify a deception-grounded ban on all forms of promotional advertising, such as a "simple" statement "Carlton's are a good smoke," or "If you smoke, please try Carlton's," all with the Surgeon General's warning attached. The effort would be to hypothesize cigarette advertising relatively free from virility and good health images and more plausibly associated with straight "informational" advertising. Of course, we cannot speculate on every form that such advertising might take. Some of the new forms may themselves be deceptive, either because of what they say or imply, or what they fail to disclose. But even without assuming this, our conclusion remains that federal legislation banning all promotional advertising could be grounded on the unprotected character of deceptive advertising. Congress could quite sensibly conclude that such a ban is necessary in order to extirpate fully the residual effects of prior smoking advertisements. See *Friedman v. Rogers, supra* (ban on trade names supported by history of past abuses). What is more, permitting any form of promotional advertising invites industry abuse in efforts to avoid the ban. This danger is not a matter of fancy, as a recent article in the *New York State Journal of Medicine* shows. This article describes the unremitting efforts of the tobacco industry to avoid the reach of an advertising ban. Kjonstad, "An Attempt to Circumvent the Ban on Cigarette Advertising," *New York State Journal of Medicine, supra*, at 403. Accordingly, given the past abuses and the difficulties of drawing lines, Congress is entitled to believe that a broad ban may be necessary, to prevent the continuation of deceptive advertising. Finally, even if some specific forms of promotional advertising could not be proscribed under the deception rationale, that fact would not result in invalidating the Congressional legislation as a whole. *Ohralik v. Ohio State Bar*, 436 U.S. 447, 462 n.20 (1978) (first amendment does not require allowance of overbreadth challenge in commercial advertising context); Monaghan, *Overbreadth*, 1981 S.Ct. Rev. 1.

IV.

Even if, contrary to the foregoing analysis, current cigarette advertising were determined not to be misleading in the constitutionally relevant sense, Congress possesses adequate authority to prohibit such advertising. *Central Hudson, supra*, defines the level of constitutional protection to be accorded non-deceptive commercial advertising. That decision makes clear that prohibition of even non-deceptive advertising is valid if it seeks to implement a substantial governmental objective, if the prohibition directly advances the legislative goal, and if it reaches no further than necessary to achieve that goal. In our view, a ban on promotional cigarette advertising satisfies each of these requirements.

1. No further argument here is needed to demonstrate the substantial nature of the governmental interests in the prevention of the devastating health consequences and massive economic losses caused by cigarette-induced diseases. Suffice it to note that far less compelling interests have been held sufficient to constitute a substantial governmental interest. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (not the actual existence of lawyer overreaching but the danger of such a harm); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (general interest in traffic safety and aesthetics justifies a complete ban on commercial billboard advertising). See also *Dunagin v. City of Oxford, supra*, 718 F.2d at 747 (liquor use and health); *Larus & Brother Co. v. FCC*, 447 F.2d 876, 879-80 (4th Cir. 1971) (cigarettes dangerous to health); 15 U.S.C. §§ 1331-41.

2. The argument may be made that advertising does not contribute to the overall amount of smoking in our society, and so its prohibition will not directly advance the governmental interest in reducing cigarette consumption. Of course, this is an empirical issue on which we claim no special expertise. But the existing data lead us to make several observations. Apparently some industry members will contend that the two billion dollar advertising campaign is directed simply at maintaining brand competition among existing smokers. See Note, *supra*, 65 Colum. L. Rev. at 638. The existing economic data make this a virtually incredible assertion. The data indicate that, like other industries, the tobacco industry operates on the Madison Avenue premise that a substantial correlation exists between advertising and consumption. This is why it spent approximately two billion dollars in 1983 on advertising and promotion.

In any event, the crucial question is not whether the current advertising is aimed at maintaining intra-brand competition, but whether a total ban on all promotional advertising would reduce total consumption. In *Central Hudson* the Supreme Court thought it obvious that a correlation exists between advertising and demand. See *Central Hudson*, 447 U.S. at 569 (the state's "interest in energy conservation is directly advanced by [the advertising ban]. . . . There is an immediate connection between advertising and demand for electricity." Moreover, we have

some highly suggestive specific evidence that consumption is responsive to advertising. Between 1968 and 1970, the Federal Communications Commission, invoking the fairness doctrine, required the running of anti-smoking ads. The net result was a substantial decline in smoking. As Judge Wright observed in his dissenting opinion in the *Capital Broadcasting* case, *supra*, cigarette advertisers welcomed the ban on television advertising, since their gains were more than offset by losses attributable to anti-smoking advertisements. 333 F. Supp. at 588-89. But "[w]ith the cigarette smoking controversy removed from the air, the decline in cigarette smoking was abruptly halted and cigarette smoking immediately turned upward again." *Id.* at 589.

In addition, several studies apparently show a significant statistical correlation between advertising expenditures and smoking. Other studies indicate that a decline in promotional advertising results in a decline in smoking. These correlations may not "prove" in any absolute sense the existence or strength of the connection between advertising and consumption, or between consumption and other relevant variables such as parental and peer-group attitudes. But proof of that order is not required. To demand such proof of legislative facts would render government unworkable. "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (holding that "[a]lthough there is no conclusive proof of a connection between antisocial behavior and obscene material, the [state] legislature could quite reasonably determine that such a connection does or might exist," *id.* at 60-61).

On the basis of existing data, a substantial basis exists for a conclusion that, directly and indirectly, cigarette advertising contributes to the overall level of cigarette consumption. And of course the present ban on promotional advertising on the electronic media rests upon just such inferences about the potency of this kind of advertising, particularly with respect to the young. See *Capital Broadcasting*, *supra* 333 F.Supp. at 585-86. Thus, this is not a case where Congress is asked to ban commercial speech simply "because of an unsubstantiated belief that its impact is 'detrimental.'" Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 92 n.6 (1977).

At this point, it is important to note another factor. Of course, "Congress . . . may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980). And Congress is under no duty to make any findings of fact to justify legislation. *Ibid.* But, presumably, any Congressional legislation will be accompanied by findings with respect to Congressional assessment of the relationship between advertising and consumption. In the past, the Supreme Court has expressed some uncertainty about the extent to which it may properly defer to legislative fact-finding where first amendment interests are concerned. See Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 230-31 n.16 (1985). But judicial deference to legislative fact-findings is quite consistent with the limited protection accorded to commercial advertising by the first amendment. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), supports this conclusion. There a majority of the Court concluded that in the interest of traffic safety the state could validly ban all commercial advertising on billboards. This was held to be a substantial state interest. The plurality opinion then said, *id.* at 508-509:

> The more serious question, then, concerns the third of the *Central Hudson* criteria: Does the ordinance "directly advance" governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety. The California Supreme Court noted the meager record on this point but held "as a matter of law that an ordinance which eliminates billboards designed to be viewed from the streets and highways reasonably relates to traffic safety." Noting that "billboards are intended to, and undoubtedly do, divert a driver's attention from the roadway," and that whether the "distracting effect contributes to traffic accidents invokes an issue of continuing controversy," the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable.

The recognition that commercial advertising is entitled to limited constitutional protection is fully consistent with the acceptance of an appropriate role for legislative judgments, particularly those of Congress, on what are largely empirical issues that do not admit of perfect proof.[4] See also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), recognizing the long practice of judicial deference to FTC findings of deceptive advertising, because the finding of deception "rests so heavily on inference and pragmatic judgment."

In sustaining in-state promotional bans on liquor advertising, both the Fifth and Tenth Circuits deferred to state legislative judgments that prohibition would reduce consumption. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 500-501 (10th Cir. 1983), rev'd on other grounds sub nom. *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984); *Dunagin v. City of Oxford*, 718 F.2d 738, 747-51 (5th Cir. 1983), cert. den. 104 S.Ct. 3553 (1984); Note, *supra*, 85 Colum. L. Rev. at 637-39. In our view, those courts were correct, and it is an *a fortiori* proposition that deference should be accorded by the Supreme Court to any plausible Congressional judgment on the nexus between advertising and consumption. (And we might appropriately add here that, though it is not necessary to our earlier conclusion, a similar deference would be appropriate to a Congressional determination that promotional advertising is deceptive and misleading.)

3. The Court has never been altogether consistent in defining what it means by its requirement that any restrictions on speech be no greater than necessary to achieve the legislative goal. Ely, *Flag Desecration: A Case Study in the Rules of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1484-87 (1975). See also Note, 85 Colum. L. Rev. at 640-41. But, however considered, a successful challenge to a Congressional determination that nothing less than a total ban on promotional advertising will suffice is implausible.

As we have already noted, Congress could conclude that further reliance upon counterspeech—for example, strengthened warnings—is not likely to be successful because of the substantial public confusion over just how dangerous smoking really is. Moreover, Congress could also conclude that to be effective any prohibition must reach all product advertising and not merely the particularly seductive image advertising. This is because, as has been noted, the residual effects of past advertising must be fully eliminated, and because both reason and experience indicate that the tobacco

[4]One dissatisfied commentator suggests that judicial deference in *Metromedia* turned on the fact that the billboard ban was content neutral. See Note, *Liquor Advertising: Resolving the Clash Between the First and Twenty-First Amendments*, 59 N.Y.U. L. Rev. 157, 164-65, 178-79 (1984). This analysis is without foundation in either the quoted language or in the reasons that justify inclusion of any commercial advertising within the first amendment.

dustry will constantly attempt to circumvent any partial mitations on its ability to advertise.

In these respects, a complete ban on cigarette advertising ffers significantly from the types of advertising prohibions that have been found by the Supreme Court to be nconstitutional because greater than necessary under the articular regulatory circumstances. In *Central Hudson Gas Electric Co. v. Public Service Commission, supra*, 447 U.S. : 569-571, the Court invalidated a total ban on promotional lvertising by an electrical utility because "[t]he Commison's order prevents appellant from promoting electric rvices that would reduce energy use by diverting demand om less efficient sources, or that would consume roughly e same amount of energy as alternative sources." In other ords, some of the prohibited advertisements might actually ave furthered rather than threatened the regulatory bjective of conservation. No cigarette advertisement within e reach of the AMA's proposal can be defended as ntributing to the goal of reducing or containing the level of noking. The Court also noted in *Central Hudson, supra* at 1, that more limited regulatory strategies such as restrions on "format and content" or obligations that advertis- s disclose information regarding the costs of product use ad never been tried by the Public Service Commission or herwise shown to be ineffective. In contrast, a prohibiton all cigarette advertising is now under serious discussion ly because over a period of two decades a wide range of ternative regulatory strategies has been tried and found sufficiently effective at preventing a massive loss of uman life.

For similar reasons, it is difficult to argue that a complete rohibition of cigarette advertising is greater than necesry because such a ban could not be expected to further the gulatory objective more effectively than would a more nited restriction. Compare *Bolger v. Youngs Drug Prodts Corp., supra*, 463 U.S. at 77. One cannot be absolutely rtain that a total prohibition on cigarette advertising will duce or contain the rate of smoking, but years of perience indicate that no more limited and qualified form advertising regulation holds nearly so much promise of hieving that legitimate and desirable objective.

It is noteworthy that in other settings where a history of rtial regulation has indicated a need for more stringent easures, the Court has upheld total prohibitions on certain pes of advertising. In *Metromedia, Inc. v. City of San iego, supra*, 453 U.S. at 508, the Court[4] stated that a mplete prohibition on all commercial billboards does not olate the First Amendment: "If the city has a sufficient asis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends." See also *Ohralik v. Ohio State Bar Ass'n, supra*, 436 U.S. at 464 (upholding complete prohibition on direct, in-person solicitation of clients by attorneys).

V.

The foreward to the U.S. Surgeon General's 1979 Report on the Health Consequences of Smoking stated that "[It] is nothing short of a national tragedy that so much death and disease are wrought by a powerful habit often taken up by unsuspecting children, lured by seductive multimillion dollar cigarette advertising campaigns." In our opinion the first amendment does not disable Congress from taking effective action. We do not believe that image advertising of this lethal and addictive product about which the public, particularly its youth, is badly informed is entitled to first amendment protection under the standards articulated in *Central Hudson*. In our opinion, therefore, a Congressional ban on promotional cigarette advertising would be valid.

Vincent Blasi
Corliss Lamont Professor of Civil Liberties
Henry Paul Monaghan
Thomas M. Macioce Professor of Law

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[4]The part of the four-justice plurality opinion discusses the question of the claimed unnecessary breadth of the prohibition was joined also by Justice Stevens.

In sum, a total ban is entirely congruent with the government's interest in curtailing smoking in all age levels of the population. Even were the government's interest narrower and assumed to be focused only on children and adolescents, a total ban would be necessary. This interest is undeniably substantial, *Bolger v. Youngs Drug Products Corp., supra*, 463 U.S. at 74, and this is not a case where prohibition would provide "only the most limited incremental support for the interest asserted." *Id.* at 73. The tobacco industry heavily concentrates on this youthful population, and short of a total ban it is not clear how the government could insulate this audience from such advertising. Compare *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978). In any event, this too is an area where the Court would and should show appropriate deference to reasonable Congressional findings as to what was necessary.

Addendum

Subsequent to the date of this opinion but immediately prior to publication of this issue of JAMA, *the Supreme Court published its opinion in* Posadas de Puerto Rico Associates v Tourism Company of Puerto Rico, *No. 85-1905 (July 1, 1986). The Court held that Puerto Rico's prohibition of advertising of gambling casinos to the residents of Puerto Rico does not violate the First Amendment since it satisfies the four-prong test articulated in the* Central Hudson *case. The Court rejected the appellant's argument that, having chosen to legalize casino gambling for Puerto Rico residents, the First Amendment prohibited the legislature from using restrictions on advertising to accomplish its goal of reducing demand for such gambling.*

In Posadas *there was no contention that the advertising in question was misleading or fraudulent. The Court found that the second element of* Central Hudson *was satisfied because the Puerto Rico legislature's interest in the health, safety, welfare of its citizens is a "substantial" government interest. The third element was met because the legislature believed that advertising of casino gambling would increase demand, and such a legislative judgment was "not manifestly unreasonable." The advertising restrictions met the fourth prong—that they be no more restrictive than necessary to serve the government's interest—because the legislature's decision is controlling as to whether "counterspeech" could be as effective in reducing demand as a restriction on advertising.*

It is the author's contention that tobacco advertising is misleading and therefore does not satisfy the first prong of the Central Hudson *test. However, assuming for the sake of argument that it is not misleading, the authors believe that the* Posadas *opinion, which referred with approval to various legislative restrictions on tobacco advertising, provides a firm and compelling basis for the constitutionality of the AMA's proposed ban on tobacco advertising. A detailed analysis will appear in a later issue of* JAMA.

Senator SIMON. Mort Halperin, a veteran of many appearances before this committee.

Mr. HALPERIN. Thank you, Mr. Chairman.

I must say, as I say in my statement, that this is one of those occasions in which I am not pleased to be here. We had hoped very much that section 955 of the bill, which is the only provision to which we object, would be rewritten so as to in our view remove its objectionable provisions, and I am still hopeful that that will happen before the committee reports out the bill.

Let me say we are not here predicting what the U.S. Supreme Court will do, and if I have to place a bet, I guess I would agree with the previous speaker that the U.S. Supreme Court would probably not find this statute unconstitutional.

What I am here to say in behalf of the ACLU is that we think it should; that in the ACLU's judgment, the provision delegating to the State the right to control advertising is bad public policy and is in our view unconstitutional because its predictable result will be to interfere with the right of consumers to get this information and the right of advertisers to give out the information.

The issue is not whether individual States will pass provisions which themselves are unconstitutional. If that were the only thing that was at stake here, and if the only provisions here covered those kinds of provisions, then it might be appropriate to say let's State pass laws and see whether the U.S. Supreme Court will uphold them or not.

The problem is that what we are dealing with here is a product that we all know is extraordinarily controversial, and the effect of allowing the States to regulate it would mean that each State will pass a different restriction. Each restriction in itself might be constitutional. We think that warning labels are constitutional, so that if there were no Federal warning label, a State warning label might well be constitutional. But if each State passes a different warning label, the fact that each one is separately constitutional nevertheless produces a system in which it becomes impossible to advertise the product, and that result in our view is unconstitutional.

Since that is the clear result which will occur we believe from the enactment of this legislation, and we believe in fact many of the people who have proposed this legislation have that purpose in mind, we think in fact Congress should not act since the purpose of this change in the restriction of advertising is not to avoid misleading advertising, which is already prohibited under Federal law, but we think to try to prevent advertising of this product in all forms.

Now let me make just one other point, and that goes to the question of whether the attempt to ban advertising, which we believe this is, conforms to the requirement that Congress or the States take restrictions which are the least restrictive means and the most effective means to deal with the objective; and even to the degree that that has been loosened, there still needs to be a clear, logical connection.

We have looked carefully at the evidence on this question, and as far as we can tell, it supports the view which is suggested in some of the testimony that there simply is no evidence that tobacco ad-

vertising increases the level of smoking, and no evidence that eliminating tobacco advertising will reduce the amount of smoking.

There is substantial evidence of what will be a big difference, and one of the things is what you already mentioned—namely, the price. Increasing the price would make a substantial difference. Assisting people to quit, including teenagers, poor teenagers, because teenagers as well as adults in very large percentages want to quit, and help in allowing them to quit would make an enormous difference. Affirmative speech, which the bill provides for, would also make a difference.

And given a situation in which the evidence suggests that there are things that Congress can do—assuming it has the votes to pass them, but things it has the power to do—which would make a real difference, and the lack of evidence that bans on cigarette advertising make any difference here reinforces our view that this is the wrong way to go.

I appreciate the opportunity to be here.

Senator SIMON. Thank you very much.

[The prepared statement of Mr. Halperin and Mr. Barry Lynn follows:]

PREPARED STATEMENT OF MORTON H. HALPERIN, DIRECTOR AND BARRY W. LYNN, LEGISLATIVE COUNSEL, OF THE AMERICAN CIVIL LIBERTIES UNION, WASHINGTON OFFICE

Mr. Chairman:

I appear here on behalf of the American Civil Liberties Union (ACLU). The ACLU, as you know is a national membership organization of some 300,000 people dedicated to the defense of the Bill of Rights.

It is customary at the outset of a statement of this kind to express pleasure and appreciation at being asked to testify. Normally Mr. Chairman, that is the case when I and others from the ACLU appear before you. On this occasion, I must confess that I appear reluctantly and regretfully.

We are well aware of the fact that there are many proposals for restricting advertising of cigarettes that have been introduced by other members of Congress and which were strongly urged upon you. We very much appreciate the fact that in this Congress as in prior Congresses you have declined to sponsor such measures. The real test of a civil libertarian is that he or she is prepared to defend civil liberties even when they conflict with objectives which are most important to that person. I am well aware of the deep concerns of you and your staff about the health hazards of cigarettes; we recognize and appreciate the deference you have given to the requirements of the First Amendment.

As you know, Mr. Chairman, we have been in discussions with members of your staff in an effort to resolve the last remaining differences that divide us on the issue of the proper scope of any removal of the current preemption of action by the States on this matter. We had hoped to reach an agreement which would have

made it unnecessary for us to ask to appear today. Regretfully we are not at that point. We remain willing to continue those discussions and hope that we will be able to reach agreement.

However, since this will be the final hearing, as we understand it, before the Committee marks-up the legislation, we are here today to say that section as drafted, in our view, violates the requirements of the First Amendment. By that I mean not that we predict how the Supreme Court will rule, but rather that, applying ACLU policy as enacted by our national Board of Directors, the provision is one that we must oppose. Let me briefly explain why.

Under current law "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes, the packages of which are labelled in conformity with federal labeling requirements." (Current law also preempts additional state or local labeling requirements.) Section 955 of S. 1883, as initially drafted and in the alternative versions we have seen, would act as a direct or de facto repeal of current federal preemption, opening up the possibility that States will impose their own additional requirements on the advertising of tobacco products within their borders. (We do not have any objection to removal of preemption regarding the sale or distribution of tobacco products themselves.) Indeed, repeal of the existing language invites this result and would not even bar a State from prohibiting all advertising of the product. The ACLU has

testified on several occasions in opposition to a ban on the advertising of lawful tobacco products. We have also testified before the Ways and Means Committee in opposition to efforts to amend the Internal Revenue Code to prohibit the cost of tobacco advertising from being deemed a business expense.
On the other hand, we did not oppose the legislation imposing federal labeling and warning requirements on tobacco.

The current federal warning requirements in tobacco advertising represent a modest intrusion into the otherwise untrammeled right of publishers to print what they choose. Since the rotating requirements are nationally-mandated, they are consistent and do not pose a problem for national advertisers. The same Salem advertisement produced in an advertising agency in New York can be run everywhere in the United States.

Consider, however, the practical effect of removing the federal preemption language regarding tobacco advertising. Every state legislature would be invited to require messages as a part of cigarette advertising which are to be applied in their state in addition to the federal warning. An advertisement in California might be required to contain a warning that is the size of one-quarter of the advertisement noting: "Smoking will inhibit your ability to surf." One in Ohio might be required to contain the phrase: "The friendly people of Ohio remind you that smoking makes you less appealing." On the other hand, the North Carolina advertisements might be required to contain, in type twice as large as that of the federal warning: "Whatever the

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Surgeon General thinks, the legislature of North Carolina thinks tobacco will make you healthy, wealthy, and wise." Now, the problem a multiplicity of warning messages poses is obvious. Either a publisher would only be able to publish advertisements specifically prepared for his State's requirements, or he would have to publish advertisements with every State's messages present. In the latter case, a large number of warnings would nearly obliterate any information about the product consumers are being warned against. This concern is not speculative.

Our concern about all this is not rooted in the additional costs per se to be imposed on tobacco companies, but rather on the implications such a system has for the First Amendment interests of those who would disseminate and those who would receive information about the lawful product at issue. We fear that this legislation will prove a de facto ban on national tobacco advertising, albeit a ban in sheep's clothing.

It has been argued that removing federal preemption is simply an act which puts those who manufacture or distribute tobacco products "in the same position as other...manufacturers." This is simply untrue. To evaluate the "equal footing" argument requires that we briefly take note of the history of tobacco regulation, and then look seriously at the actual climate in the United States today regarding the advertising of tobacco products.

In 1965, Congress decided that tobacco was a very different product than other products; it imposed a warning label

requirement because it viewed tobacco use as a national health issue. Congress preempted the field because it believed that the federal government was in the best position to make determinations about the kinds of information that should be made available and the kind of warnings that should be required. Indeed, after the 1965 warning was deemed inadequate, the warnings were strengthened in on two occasions. Having established that federal role, there has been no evidence that suggests a change is necessary or desirable.

It is disingenuous to argue, as some have in support of this legislation, that Congress does not know what the states would do with their newly delegated power to add warnings. It is entirely predictable that many will act to impose them. The national concern over tobacco use, escalated by the recent Surgeon General's conclusion that addiction to tobacco is akin to addiction to heroin and cocaine, means that it will be the target of legislative efforts to increase regulation at the state level if preemption is removed. It should also come as no surprise the many of those who will seek to interpose new state warnings recognize that a central purpose of their action is to set up impediments to advertising of the tobacco products they loathe. That is the real world in which this statute will operate.

In our view, this section poses a substantial threat to commerce in First Amendment protected speech. The ACLU does not generally take positions on matters affecting the interstate commerce in most products. The length of trucks or size of

railroad cars does not present civil liberties problems. However, where the effect of a statute is to impede the interstate flow of information protected by the First Amendment, there is cause for alarm. By essentially delegating to the States the authority to require new forms of advertising copy, the effect of the legislation is to invite an unconstitutional result. Indeed, Congress realized in 1965 as several States were considering their own labeling or advertising requirements that a federal role was vital to the flow of information. As then Senator Sherman Cooper put it: "the control of advertising by State and local bodies would result in a chaotic condition". Although prior to 1976 the Supreme Court had provided only limited First Amendment protection to so-called "commercial speech," any simple Constitutional distinction between "commercial" and "non-commercial" speech has been eliminated in several landmark decisions including Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 425 U.S. 748 (1976) (rejecting a state ban on publishing prices for prescription drugs) and Central Hudson Gas and Electric Corp. v. Public Service Commission 447 U.S. 557 (1980) (invalidating broad regulation banning promotional advertising by an electrical utility). As we have testified on numerous occasions, we believe that any ban or undue content regulation of tobacco advertising violates Supreme Court "commercial speech" doctrine, notwithstanding the decision in Posadas v. Tourism Company of Puerto Rico 106 S.Ct. 2968 (1986).

So, although the Congress can obviously delegate responsibilities to the states, it is still constrained by the constitutional demands of the First Amendment. In our view, the anticipated effect of removing advertising preemption is the censorship of tobacco advertising by the States. This result is so clear and predictable that it must be recognized as constitutionally impermissible. When evaluating First Amendment implications constitutional jurisprudence demands that a law "must be tested by its operation and effect." Near v. Minnesota 283 U.S. 697 (1931). The effect here is to decimate national advertising of tobacco products lawful in every State.

We urge to remove or rewrite the section of S. 1883 which now violates the First Amendment interests of those who produce, distribute, or read the advertising of tobacco companies. We look forward to being able to withdraw our objections to this legislation.

Senator SIMON. Floyd Abrams of The Tobacco Institute.

Mr. Abrams.

Mr. ABRAMS. Senator Simon, thank you for inviting me here today.

If I had ever thought that Professor Blasi, with whom I have had the pleasure of teaching on occasion, and I would have been testifying at the same time before the same Congressional committee, I would have assumed we would have been on the same side—and if anybody had ever predicted to me that Professor Blasi would be taking his First Amendment lessons from Chief Justice Rehnquist, I would not have believed him. [Laughter.]

I say that to you joking, of course, because Professor Blasi takes his lessons from no one except what he believes to be correct. But I mean to make a point from it.

You already heard today from Professor Blasi, stated in very firm terms, that the *Posadas* case would decide any question of constitutionality. Professor Blasi mentioned and urged upon you that the *Posadas* case makes clear that even a total ban on cigarette advertising would be constitutional.

What I come here to say in this part of my presentation as opposed to my prepared text is that it is for Congress in the first instance, and not the courts, to pass upon the constitutionality of legislation which it is considering.

Senator Ervin said once that it is for Congress to determine to the best of its ability whether proposed legislation is constitutional when every member of Congress casts his vote in respect to it.

And so even if you agreed with Professor Blasi that the *Posadas* case or other cases make it likely that a ban on cigarette advertising would be upheld—and as my prepared statement indicates, I do not—but even if that were a correct prediction, indeed, even if the U.S. Supreme Court had already held in so many words that all cigarette advertising could be banned, I would still urge upon you, Senator, that it is for you in the first instance to make an informed First Amendment decision as to what First Amendment policy you as a member of Congress chose to implement.

And I would urge upon you Justice Brennan's views and Justice Brennan's language from cases such as *Posadas* in which dissenting Justice Brennan said that "No State may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity." And Justice Brennan said, "No differences between commercial and other kinds of speech justify protecting commercial speech less extensively where the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities."

That, Senator Simon, is what I believe the First Amendment should be held to mean; that is what I believe members of the Senate should keep in mind as they decide on whether to enact legislation which will at the very least encourage States and municipalities to enact at least a patchwork of conflicting and sometimes totally destructive legislation banning commercial speech.

If I thought it otherwise, or if you think it otherwise, that would be a different case. But if Justice Brennan is persuasive, and if First Amendment law, properly understood, should be held to protect lawful speech, truthful speech about lawful products, then leg-

islation should not be enacted which will obviously encourage States and localities to ban just such speech.

Thank you, Senator.

Senator SIMON. Thank you.

[The prepared statement of Mr. Abrams follows:]

Statement of Floyd Abrams

on behalf of

The Tobacco Institute

before the

Committee on Labor and Human Resources

United States Senate

April 3, 1990

Mr. Chairman and distinguished members of the Committee, I thank you for the opportunity to appear before you once again to comment on the constitutional implications of S. 1883. At my last appearance before this Committee, on February 20 of this year, I submitted a statement dealing, in the main, with constitutional issues arising out of the provision of the proposed legislation that would permit the proposed federal Center for Tobacco Products to finance anti-smoking advertising on television at a time when cigarette companies are barred from advertising their products on television and the provision that affirmatively seeks ways of influencing media coverage of tobacco.[1] Today I will direct my remarks to Section 955 of the proposed legislation, the section which would mark a retreat

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1 That testimony, which I understand was introduced into the record at that time, focused primarily on Sections 903 and 911 of S. 1883.

from a 25-year-old federal policy of nationally uniform regulation of tobacco advertising. This provision would allow "any State or local government [to] enact[ ] additional restrictions on the advertising, promotion, sale or distribution of tobacco products to persons under the age of 18." It would allow additional restrictions "on the placement or location of advertising for tobacco products that is displayed solely within the geographic area covered by the applicable State or local government, such as advertising on billboards or on transit vehicles." These State and local restrictions, it should be noted, must be "consistent with and no less restrictive than the requirements of this subtitle and Federal law".

Thus, under S. 1883, states and localities might, for the first time in 25 years, deem themselves free to ban all cigarette advertising on billboards, in subway cars, in buses and, perhaps, more generally as well. In fact, it is no exaggeration to say that the predictable result of the adoption of S. 1883 would be that Congress would be understood by states and municipalities -- and, I believe, correctly understood by them -- to be giving a green light to just such restrictions. What other message would you be sending?

For at its heart, the provision I quoted to you is far more than a routine public health measure. It is aimed not at the sale of what its sponsors believe is a threatening product, but at speech about that product. In the words of Senator Kennedy, this provision will allow State and local governments 'to take more effective action against advertising and promotion in their communities.'[2] The target, then, is speech itself -- commercial speech, to be sure, but speech nonetheless.

That being so, it is well to begin with two basic principles that I believe should guide this Committee as it considers the serious constitutional questions raised by the terms of S. 1883. The first is that the reach of First Amendment protection for cigarette advertising is just the same as for any other product. Just as the First Amendment protection for the press applies to newspapers large and small, controversial as well as bland, irresponsible as well as responsible, the rules established by the First Amendment for commercial speech are -- and must be -- the same for all who claim its protection.

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2 Cong. Rec. S15722, S15723 (daily ed. November 15, 1989) (statement of Sen. Kennedy).

And so it follows, inexorably and inevitably, that the First Amendment does not disappear or evaporate when cigarettes are at issue -- unless, that is, it could do so for the advertising of any other product. The rules must be the same for all advertising. If they were not, we would not be talking about constitutional law and First Amendment law at all.

A corollary of that proposition is the second principle I urge upon you. It is that, entirely aside from what predictions I and your other witnesses may offer you as to the level of protection of commercial speech the Supreme Court will hold to be available in the future, it rests in the first instance with you to determine what level of First Amendment protection you think should be afforded to commercial speech. Justice Oliver Wendell Holmes well observed that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."[3] Senator Sam Ervin put it even more forcefully: "every Congressman", he said, "is bound by his oath to support the Constitution, and to determine to the best of his ability whether proposed

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3 Missouri, K & T.R. Co. v. May, 194 U.S. 267, 270 (1904).

legislation is constitutional when he casts his vote in respect to it."[4]

And so if you agree, for example, with Justice Blackmun's first articulation of the desirability of protecting commercial speech -- that the "highly paternalistic" approach of denying the public more information for their own supposed good is wrong and that the "best means" of serving the public "is to open the channels of communication rather than to close them" -- you should oppose S. 1883 on that ground alone. If you believe, as I do, that censorship is contagious, that it is habit-forming, and that our construction of the meaning of the First Amendment -- in the area of commercial speech, as well as other areas -- should reflect this, you should oppose S. 1883. And if you believe, as I do, that censorship, once established, takes on a life of its own, you should oppose S. 1883.

The principle that I last referred to has long been recognized by the United States Supreme Court in considering regulations of speech ranging from the political to the obscene to the commercial. It was first recognized by the Supreme

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4 Quoted in P. Schuck, The Judiciary Committee 175 (1975).

Court in the commercial speech context some 15 years ago, in Bigelow v. Virginia.[5] It continues to be recognized today.

In the Bigelow case, the editor of a Virginia newspaper was convicted of publishing an advertisement announcing the availability and legality of abortions in New York. At that time, 1975, abortion remained illegal in Virginia, as did the publication of information encouraging or promoting the procuring of an abortion. Recognizing that the State had an important interest in safeguarding the health of its citizens, the Court nonetheless rejected Virginia's attempt to control what its citizens could and could not hear about commercial activities that were lawful in other states, even if they were unlawful in Virginia.

The rationale underlying the Court's decision in Bigelow was strengthened in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., where the Court struck down a prohibition on pharmacists' advertising of retail drug prices. The Court took note of the State's real concern about the impact of price information on consumers and the regulated pharmacists themselves. But it held that this interest was inadequate to overcome the constitutional problems imposed

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5 421 U.S. 809 (1975).

by a complete ban on speech, even where the speech was commercial. The Court was troubled by the assumption underlying the State's paternalistic protection of its citizens, which it said 'rests in large measure on the advantages of their being kept in ignorance.'[6] The Court recognized that Virginia's system of censorship was based on the assumption that consumers would use the information contrary to their best interests if the information were not suppressed by the State. But the Court suggested an alternative:

> 'That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.'[7]

The Court recognized that its approach and the 'paternalistic' approach adopted by Virginia were in conflict, and concluded:

> 'But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'[8]

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6 425 U.S. at 769.

7 425 U.S. at 770.

8 Id.

So it struck down the Virginia statute as facially unconstitutional.

Later Supreme Court decisions continued to emphasize the impermissibility of prohibitions on non-deceptive speech about a lawful subject, even in the face of significant state interests. In Linmark Associates, Inc. v. Township of Willingboro,[9] the Court struck down a local ban on residential "for sale" signs, notwithstanding the government interest in encouraging racial integration and deterring white flight. The Court once again in this case rejected the concept that

> "the only way [a state] could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading . . . ."[10]

The Court emphasized that the constitutionally preferred approach is one of "'more speech, not enforced silence.'"[11]

Again, in Carey v. Population Services International, Inc., 431 U.S. 678 (1977), the Court struck down a ban on advertising of contraceptives despite the asserted state

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9 431 U.S. 85 (1977).

10 431 U.S. at 97.

11 Id., quoting Brandeis, J., concurring in Whitney v. California, 274 U.S. 357, 377 (1927).

interests in protecting the public against the offensiveness and legitimation of youthful sexual activity inherent in such advertising. Because the statute challenged sought "to suppress completely any information about the availability and price of contraceptives," the Court held the statute invalid.[12]

In Central Hudson Gas & Electric Corp. v. Public Service Commission, the Court sought to distill the principles articulated in its commercial speech cases into a single test of general applicability to restrictions on commercial speech.

The first prong of the now-famous four-part test inquires as to the lawfulness of the activity being advertised and whether or not the speech about that activity is misleading.

If the speech relates to lawful activity and is not misleading, the test requires an examination of the purported state interest to determine if, second, the interest is "substantial"; third, whether the legislation "directly advances the governmental interest asserted"; and fourth, "whether it is not more extensive than is necessary to serve that interest."[13]

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12 431 U.S. at 700 (footnote omitted).

13 447 U.S. 557, 566 (1980).

While the Court's language leaves open the possibility that non-deceptive advertising about legal products or services theoretically could be prohibited, as S. 1883 would allow, neither Central Hudson itself nor the Court's subsequently decided cases supports this result.

Instead, the Court in the Central Hudson case explained why it has viewed prohibitions on the dissemination of truthful commercial speech with the greatest wariness (as it has in other First Amendment contexts).[14] It said, in words highly relevant to the statute before you today:

> "We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See Virginia Pharmacy Board, 425 U.S., at 780, n.8 (Stewart, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."[15]

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14 See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.35 (1976) (Stevens, J., plurality opinion); id. at 81 n.4 (Powell, J., concurring). See also Talley v. California, 362 U.S. 60 (1960); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939); Saia v. New York, 334 U.S. 558 (1948).

15 Central Hudson Gas & Electric Corp. v. Public Service Commission, supra, 447 U.S. at 566 n.9. See also Blackmun, J., concurring: "Those [statutes] designed to deprive customers of information about products or services that are legally offered for sale consistently have been invalidated." 447 U.S. 574 (footnote omitted).

Since it articulated this standard in Central Hudson, the Supreme Court has decided a number of commercial speech cases in which it applied the four-part test and struck down statutes which did not pass First Amendment muster. It did so in Central Hudson itself. It did so in In Re R.M.J.[16] and in Zauderer v. Office of Disciplinary Counsel,[17] where it struck down different state disciplinary rules allowing only certain types and certain means of attorney advertising, but not others. It did so again in Bolger v. Youngs Drug Products Corp.,[18] in ruling that a federal statute barring the mailing of contraceptive advertisements violated the Constitution.

The two most recent Supreme Court commercial speech opinions, Posadas de Puerto Rico Assoc. v. Tourism Co.[19] and

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Footnote continued from previous page.

16 455 U.S. 191, 207 (1982).

17 471 U.S. 626, 655 (1985).

18 463 U.S. 60 (1983).

19 478 U.S. 328 (1985).

Board of Trustees of the State University of New York v. Fox,[20] are not to the contrary. In Posadas, the Court applied the four-part test to uphold a partial ban by the Puerto Rico legislature on casino gambling advertising addressed to Puerto Rico residents, a ban that did not affect advertising addressed to tourists in media available to Puerto Rico residents. In the SUNY v. Fox case, the Court did not rule one way or the other on the constitutionality of the restriction of commercial advertising in state university dorm rooms at issue there. It did, however, painstakingly apply the four parts of the Central Hudson test, indicating that the test indeed retains some teeth even after Posadas.

I am well aware that both Posadas and SUNY have been interpreted by some to mean that the Court has significantly reduced the protections available to commercial speech. Many have quoted -- and many have criticized[21] -- Justice

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20 ___ U.S. ___, 109 S. Ct. 3029 (1989).

21 See, e.g., Posadas v. Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 354-55 n.4 ("the 'constitutional doctrine' which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint -- it is called the First Amendment.") (Brennan, J., dissenting); Kurland, "Posadas de Puerto Rico v. Tourism Company: ''Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful'", 1986 S. Ct. Rev. 1; Abrams, "Good Year for the Press, But Not for Advertisers," The National Law Journal, at S-13 (Aug. 11, 1986); Lively, "The Supreme Court and Commercial Speech: New Words with an Old Message," 72 Minn. L. Rev. 289, 300-304 (1987); Gartner, "Remarks," 56 U. Cin. L. R. 1173, 1177-78 (1988).

Rehnquist's unprecedented suggestion in the Posadas case that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling".[22] It is important to remember, however, that both these recent cases reasserted -- and, certainly in the recent SUNY case, rigorously applied -- the four-part Central Hudson test for determining the constitutionality of commercial speech regulations.

I've already referred to this four-part Central Hudson test, which, as you will recall, inquires

> first, whether the advertised activity is unlawful and whether the speech about it is misleading;
>
> second, whether the government's purported interest in regulating the speech is substantial;
>
> third, whether the legislation restricting the speed directly advances the government's interest; and

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Footnote continued from previous page.

22 478 U.S. 328, 345-46 (1985).

> fourth, whether the legislation is not more extensive than necessary to serve the government's interest.

If we apply this test to S. 1883, we arrive at the following conclusions.

First, not only are sales of tobacco products legal in all 50 states and in the District of Columbia, but the advertising that would be banned by this proposed legislation is not false or deceptive, as false or deceptive advertising of all kinds is already banned by current and well-enforced federal law. There is no question, then, that the Central Hudson test applies to the speech that would be banned as a result of the enactment of S. 1883.

Second, the government's interest in promoting the health of American citizens, the deep interest that motivates the well-meaning sponsors and supporters of S. 1883, is certainly substantial.

But when we come to the third part of the test -- whether this legislation will directly advance the government interest in promoting public health -- the answer is far from supportive of any total ban on cigarette adverising. A good deal of statistical evidence, for example, based on comparisons

of foreign nations, suggests that there is no correlation between restricting tobacco advertising and decreasing cigarette consumption. Other studies have found that advertising of products that have long been on the market, such as cigarettes, promotes demand for particular brands of the product, not demand for the product itself.

A federal judge has concluded that "[w]hile cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke."[23] Even so firm an opponent of smoking and cigarette advertising as former Surgeon General C. Everett Koop has concluded as recently as last year that "[t]here is no scientifically rigorous study available to the public that provides a definitive answer to the basic question whether advertising and promotion increase the level of tobacco consumption."[24] The weight of this evidence suggests that the Congressional "finding," now included in Section 2(a)(8) of this proposed legislation, that "the tobacco industry contributes significantly to the experimentation with tobacco and the initiation

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23 Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 588 (D.D.C. 1971) (three-judge panel) (Skelly Wright, J., dissenting), aff'd mem., 405 U.S. 1000 (1972).

24 Reducing the Health Consequences of Smoking: 25 Years of Progress, at 512 (1989).

of regular tobacco use by children and young adults through its advertising and promotion practices", is simply not supported by the available facts.

Finally, the fourth part of the Central Hudson test asks whether the legislation is not more extensive than necessary to serve the government's interest. This part of the test has been most recently explained by the Supreme Court to require, at the least, a "reasonable" fit between the legislative means and ends or, in other words, a statute "whose scope is 'in proportion to the interest served'", a statute that is "narrowly tailored to achieve the desired objective."[25]

When one looks at the proposed legislation before this Committee, and in particular at the provision that would unleash the states to enact conflicting bans and regulations, one can hardly see a statute that is, in the words of the Supreme Court, "narrowly tailored to achieve the desired objective." The purpose of this statute is, after all, purportedly to "educate" and "inform" the public;[26] yet the provision I've been talking about today would permit at least the partial --

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25 Bd. of Trustees of State Univ. of New York v. Fox, supra, 109 S. Ct. at 3035.

26 See Secs. 901(b)(1), (3), (6).

and perhaps even the complete -- silencing of tobacco manufacturers. If this proposal becomes law, and states respond to Congressional encouragement by banning cigarette advertising of certain types and in certain areas, or of all types and in all areas, there will be far less useful information offered to smokers. Consumers will no longer be able to learn which brands are low-tar or low-nicotine. Nor will they have access to information about a variety of other relevant information, such as taste, price, and so forth.

As a matter of constitutional law and public policy, a statute aimed at educating and informing the public should encourage more speech, not less. It should avoid censorship, not encourage it. As Justice Scalia has recently observed, "[T]he premise of our system is that there is no such thing as too much speech -- that the people are not foolish, but intelligent and will separate the wheat from the chaff."[27]

I conclude with one theme that I offered earlier. Even if you conclude that this proposal would be or could be or might be constitutional as determined by a majority of the Supreme Court, I submit that you should still not enact it. Congress, I repeat, has its own duty, not merely to wait for the Supreme Court to apply its constitutional calculus to this legislation, but to apply its own. I urge you, in doing that, to protect the First Amendment values on which our marketplace of ideas -- and of information -- has thrived for so long.

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27 Austin v. The Michigan State Chamber of Commerce, No. 88-1569, slip op. at 16-17 (Mar. 27, 1990) (dissenting opinion).

Senator SIMON. Professor Neuborne, if we were to eliminate section 955 of the bill, do you have any objection to the rest of the bill?

Mr. NEUBORNE. No, Senator. The objections that the Freedom to Advertise Coalition has to the bill deal with the delegation to local regulation. The rest of the bill is, as far as I know, unobjectionable to the Coalition.

Senator SIMON. And what about the argument of Professor Blasi that in effect all you are doing is repealing a Federal preemption, that that would hardly be unconstitutional?

Mr. NEUBORNE. Well, I was careful in my remarks not to suggest that it would be unconstitutional to repeal the Federal preemption. I think it would be extremely unwise because it would be an invitation to unconstitutional censorship at the local level, which would usher in a generation of litigation, socially unproductive litigation at the local level, and perhaps create such a patchwork that it itself would be unconstitutional.

So that I think the question before us is not the constitutionality of repealing the preemption, but the wisdom of in effect delegating back to local authorities the power to regulate controversial speech.

The distinction between Professor Blasi's suggestion about lawyer advertising and the advertising of cigarettes is the very real world distinction that lawyer advertising is simply not a controversial activity; it is not the kind of activity that cigarette advertising is today.

Really, what we are talking about is when a particular type of speech has reached a level of notoriety, that there is a serious argument being made in the society to ban it—at that point, I suggest, Senator, it becomes an abdication of Congress' responsibility to delegate the regulatory power over that to local entities because we know that it is going to be used, and used vigorously, at that local level.

If there is to be regulation of that type of speech, let it be at the national level, let it be effective, let it be uniform, and let it be efficient.

Senator SIMON. Mr. Abrams, if we were to eliminate section 955, I don't expect you to endorse the bill, but is your opposition a little less vigorous?

Mr. ABRAMS. Senator Simon, first let me make clear that the opposition that I have voiced is on constitutional grounds only, that is to say, I on behalf of The Tobacco Institute, but there has been other testimony, of course, about other sections of the bill by people in The Tobacco Institute.

As regards constitutional issues, I have previously indicated to the committee that I had constitutional concerns about portions of sections 903 and 911 as well. One of those sections, Senator, provides basically for funding for anti-smoking advertisements on television, all this by private groups. This funding is to be accomplished at the same time as a statute remains in effect which bars cigarette companies from advertising on television.

I don't come here to urge the repeal of that earlier legislation, but it does seem to me substantively unfair and to pose a significant First Amendment problem when Congress seeks to so load the

dice as to determine by funding what the official position of the government is and what people may hear on television at the same time the other side can't be heard.

I also have problems with the section of the bill which in effect establishes funding in an effort to influence the media. There is language in the legislation, in section 911, which seeks to have individuals coordinate and otherwise seek to direct—and that's my language, but I believe "coordinate" is in the statute—what the media says about smoking, all, of course, in the good faith effort to prevent people from smoking. They want to go to people who make television programs and urge them not to have people smoke. The idea is to go to people who do other sorts of programs and deter them from doing anything which could lead people to smoke. The problem with that is that it is nothing more or less than manipulation of the press, and I have a most significant First Amendment objection to that as well.

Mr. HALPERIN. Senator, could I just comment on that provision?

Senator SIMON. Yes.

Mr. HALPERIN. We don't object to the TV advertising provision, but only because I have a different view than Mr. Abrams does about what is now prohibited. I do not understand current law to prohibit advertising by cigarette companies, but rather only advertising of cigarettes. And our view would be that if there is advertising on television, presenting a view about the danger of cigarettes, that it would be required that those stations also accept ads, whether from tobacco companies or everybody else, which challenge the arguments that were presented in those ads about the consequences of smoking, and that those ads would not be prohibited under the current law, and that if they were prohibited under the current law, the current law would be unconstitutional.

Mr. ABRAMS. I don't disagree with that, Senator—I am sorry, I'll just take a single sentence—I don't disagree with what Mr. Halperin said. I still believe, though, that given the ban on cigarette advertising that for the government to fund anti-smoking ads is unconstitutional.

Senator SIMON. Let me ask Mr. Abrams—and this may not be your field of expertise with The Tobacco Institute—incidentally, Senator Cochran wants to submit a statement for the record about this—Mort Halperin has suggested that tobacco advertising has very little to do with actual use other than choice of which brand you use—I don't want to be misquoting, but as I understand it, the tobacco industry spends about $3 billion a year on advertising.

Is that assumption correct, that this is only to try and get one brand or another used? Isn't part of tobacco advertising also to encourage consumption?

Mr. ABRAMS. A few years ago, Senator, Judge Scully Wright, who was an old fan of cigarettes or cigarette advertising, said that while cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke.

That is the position of The Tobacco Institute, and that is that it is the purpose of cigarette advertising to persuade people to smoke one brand rather than another brand, to induce people to shift or

not to shift from one brand or another, and that that is in fact its primary effect as well.

Senator SIMON. Professor Blasi, you get a final word now, since you haven't had a chance for any kind of rebuttal.

Mr. BLASI. I'd like to rebut two different points. With regard to Professor Neuborne's statement that in controversial areas we seek to regulate speech nationally, let me cite many other controversial areas where our traditions are local regulation. Obscenity is one; libel, there are constitutional standards, but there are all sorts of local variations in tort libel law. Floyd Abrams probably knows better than anyone else how libel law can differ from State to State. It has a bearing on nationally distributed news stories. Reporter's privilege—when is a source confidential. Liquor advertising—we have a regime of local regulation of liquor advertising, and the sky has not fallen. Advertisers know how to tailor their marketing to local variations.

I am told that demographic differences lead to even nationally distributed publications having different issues for different areas because of the different demographic appeals and so forth.

The other point about is there enough evidence to indicate that there is a connection between banning advertising and reducing aggregate demand—as a constitutional issue, I think we are pretty much in agreement that the court has adopted a fairly deferential standard, and as far as constitutionality is concerned, I think it is a pretty easy question. But simply as a matter of policy, let me just quote from a letter that was written by the National Advisory Council on Drug Abuse to then Secretary of Health and Human Services Margaret Heckler.

"The single most important step this society can take in its goal of preventing smoking among its people, in particular its young people, is to prohibit cigarette advertising."

There are some expert observers who think this can be very important.

[Additional statements and materials submitted for the record follow:]

Senator Thad Cochran

Mr. Chairman, I have several statements which I would like to submit for the record:

- Tino Duran, President of the National Association of Hispanic Publications, who requested to testify, has prepared a statement.
- Charles Sherrill, President of the National Association of Black-Owned Broadcasters. Mr. Sherrills' association represents Blacks who own radio and television stations, cable television systems and related businesses.
- John Enoch, Publisher of Minorities and Women in Business.
- Nat Moore - Founder and President of a Miami-based sports promotion firm.

These statements represent the views of minority groups as to the impact of this legislation on their businesses. I submit, Mr. Chairman, that their views be heard and would appreciate their testimony be made part of the record. Thank you.

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Founding President
KIRK WHISLER

National Association of Hispanic Publications

March 15, 1990

The Honorable Edward M. Kennedy
Chairman
Senate Labor and Human Resources Committee
527 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kennedy,

As President of the National Association of Hispanic Publications, I would like to be scheduled for the hearing date on April 3rd, 1990, to express my oppositions of S.1883, the Tobacco Education and Health Protection Act of 1990.

We strongly believe that if enacted, S. 1883 would severely impact the Hispanic print media industry, which relies heavily on the support of members of the tobacco industry, hence hurting the Hispanic business community and Hispanic population at large. Furthermore, this bill would establish a dangerous precedent for censoring the advertising of other "controversial" products, and would conceivably violate the First Amendment of the U.S. Constitution as it relates to freedom of choice.

We urge your utmost consideration to our opposition and pray for opportunity to present our views during the hearings.

Sincerely,

Tino Duran
President
National Association of
Hispanic Publications

STATEMENT OF THE NATIONAL ASSOCIATION OF BLACK-OWNED BROADCASTERS TO THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES CONCERNING THE BROADCAST PROVISION OF S. 1883

Mr. Chairman and Members of the Committee, the National Association of Black-owned Broadcasters (NABOB) appreciates this opportunity to comment on S. 1883, "The Tobacco Product Education and Health Act of 1990." Founded in 1976, NABOB represents the interests of 102 individuals and 160 stations nationwide. Our membership is comprised of African-Americans who own radio and/or television stations, cable systems and related businesses.

We are submitting this statement to express our particular concern with Section 903 (a)(3) of S. 1883, which states that the newly-created Center for Tobacco Products would "[coordinate] with film makers, broadcast media managers, and others regarding the impact of the media on tobacco use behavior." We believe that the vague criteria and broad language in this provision creates an invitation to the Federal government to try to censor broadcasters' and film makers' depiction of cigarette smoking.

In the name of "coordinating" with film makers and broadcasters, the government could attempt to press the broadcast industry into service as a spokesman for its views on the subject of smoking and health. Broadcasters could be forced to compromise or sacrifice the creativity or authenticity of a story in order to appease the interests and advance the goals of the federal government. For example, the Department of Health and Human Services could decide that a particular character in a television program or televisied film should not be depicted as a smoker. In addition, any program or film which features a

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Charles Sherrill
President
National Association of Black-Owned Broadcasters
1730 M Street, NW, Suite 412
Washington, D.C. 20036

smoker could be forced to include some type of anti-smoking message to present an "opposing veiwpoint." This type of proposal is both paternalistic and offensive to the free expression of ideas which our country is supposed to protect.

Forcing broadcasters to reflect the governments views and interests threatens our basic First Amendment right to speak freely -- or not to speak at all -- on issues of public policy. We cannot and should not compromise these important freedoms on the assumption that any depiction of smoking in the media is an "insidious" invitation to youth to begin using cigarettes. Such a notion is not only absurd, but could well lead us down the slippery slope of censorship -- opening the door for similar government intrusion into the media depiction of everything from alcohol use to moral behavior.

The broadcast media have always been committed to presenting a balanced and accurate portrayal of all controversial issues -- including the alleged health effects of tobacco use. Such fairness has been and should continue to be achieved without government intrusion.

Though many of us share your concerns about the use of tobacco by the young people of our nation, we cannot support any legislation which would insinuate the Federal government into the affairs of the broadcast, or any other, media. This proposal flies in the face of those values and beliefs that we, as sources of public information, hold sacred. We believe it must be eliminated.

Thank you for your attention to this matter.

STATEMENT OF MR. JOHN ENOCH, PUBLISHER, *MINORITIES AND WOMEN IN BUSINESS*, TO THE COMMITTEE ON LABOR AND HUMAN RESOURCES REGARDING S. 1883.

Mr. Chairman, Members of the Committee, I would like thank you for the opportunity to express my views on the advertising provisions contained in S. 1883, "The Tobacco Product Education and Health Protection Act of 1990."

My name is John Enoch. I am the publisher of *Minorities and Women In Business*, a small magazine designed specifically to address the unique business interests of women and minority groups in this country. My publication provides a forum for discussing issues of concern to groups which have traditionally faced great obstacles to achieving success in the business world.

As a minority publisher, I am particularly concerned about legislative proposals which would permit severe restrictions, or complete bans, on tobacco advertising. The proposals in S. 1883 easily could lead to either of these results. Censorship problems jump out from the language in S. 1883 authorizing advertising restrictions in the name of putting a halt to youth smoking. While reducing the incidence of smoking among youth is a laudable goal, one which we can safely assume no one opposes, advertising restrictions or bans will not help accomplish this purpose. As long as tobacco products are legal, they should be permitted

to be advertised to adult consumers. If there are complaints about advertisements allegedly targeting youth, forums exist to address and rectify these issues. But we should not allow our zeal, however well-intentioned, to compromise our First Amendment freedoms. Censorship, even in the name of protecting our youth, cannot be tolerated.

And that is not the only problem. These same provisions could result in a patchwork of State and local advertising restrictions which would make it extremely difficult, if not impossible, to include tobacco advertising in a magazine with national distribution, such as *Minorities and Women In Business*.

Minority publications have long relied on tobacco industry advertising revenues for their economic survival. For some publications, these revenues can often mean the difference between staying afloat and going under. In addition, small publications would be particularly hard-pressed to meet the numerous and varied State and local requirements for print tobacco advertising that would likely appear if S. 1883 is passed in its current form.

As to the issue of targeting different kinds of smokers in different advertisements, marketing experts and publishers such as myself recognize this as a common sense, accepted practice among manufacturers of consumer products. There is nothing "insidious" about advertising to a specific segment of your market. In fact, in my view, it would be more

offensive if the tobacco industry ignored its minority consumers. Furthermore, to suggest that minorities and women are somehow more vulnerable to tobacco advertising, and thus less capable of making rational and informed decisions on whether to smoke, smacks of racism, sexism and misguided paternalism.

We can be fairly certain what tobacco advertising restrictions or bans might accomplish. A recent study by the Leadership Council on Advertising Issues indicates that such restrictions could place thousands of media and advertising personnel out of work, and force many publications and agencies, especially smaller, minority-operated businesses, to close their doors, while doing nothing to reduce the number of people who smoke.

As a publisher, I oppose any attempt to compromise our fundamental freedoms of speech and expression. Charges that the editorial content of minority publications has been dictated by the tobacco industry are both unfounded and offensive. I have yet to hear similar charges against mainstream publications such as *Time* and *Newsweek*, both of which accept substantial amounts of tobacco advertising.

Mr. Chairman, adults have a right to choose whether or not they wish to smoke. The alleged health hazards of tobacco products are widely known. While tobacco products remain legal, manufacturers should be permitted to advertise. Restricting or prohibiting such advertisements would do nothing but deprive minority publications of a crucial source of revenue.

I ask that you carefully consider the negative effects that S. 1883 may have on the minority publications. The economic survival of this vital source of information for minorities and women hangs in the balance.

Thank you.

STATEMENT OF NAT MOORE, PRESIDENT, NAT MOORE AND ASSOCIATES, INC. TO THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES CONCERNING THE EFFECT OF S. 1883 ON TOBACCO INDUSTRY SPONSORSHIP OF MINORITY EVENTS

Mr. Chairman and Members of the Committee, my name is Nat Moore. Some of you may remember me from my years with the National football league's Miami Dolphins. But I do not wish to address you today as a former football player, but rather, as the current president of Nat Moore and Associates, Inc., a small, Miami-based promotions firm. My company coordinates promotions for a number of NFL-sponsored charity events, such as celebrity golf tournaments, and non-NFL related activities such as Miami's Annual Colombian Festival. It is my concern for S. 1883's potential impact on the latter events that prompts me to submit this statement.

The Colombian Festival is a two day celebration for Miami residents of Colombian extraction. The event has grown in popularity each year, the last event attracting nearly 40,000 participants. It is a great source of entertainment and pride for many members of Miami's burgeoning Hispanic community. As you can well imagine, an event of this magnitude requires a considerable amount of money to ensure its smooth and successful operation. We depend on the generosity and assistance of our sponsors to make this event accessible and affordable for all who wish to attend.

Through corporate sponsorship, the Festival can offer free entertainment to participants from a wide range of socio-economic groups. Without such funding, we would be forced to charge for many events, and cancel others altogether. Those of the most modest means would suffer the most. In all likelihood, the Festival would cease to exist.

Despite the large crowds and past success of festivals of this kind, it is often extremely difficult to attract corporate sponsors for these events. For reason of their own, many large corporations do not see the value of sponsoring minority-oriented events. The Festival has been fortunate, however, to have the strong and valuable support of the Philip Morris Companies as one of its major sponsors. Through Philip Morris' assistance and contributions, the Festival can bring consistently high quality entertainment to its participants. We are grateful to the company for its years of support, and applaud its efforts to help not only our event, but the minority community as a whole.

The legislation pending before your Committee could permit State and local governments to severely restrict or completely ban such sponsorship activity. As a former athlete, I share your concerns about the alleged health effects of smoking, particularly as they affect the youth in our country. However, I do not feel that we should pursue solutions to these concerns blindly, without considering the broader implications of these proposals.

I do not believe that the tobacco industry's support of events such as the Colombian Festival would convince anyone, especially a young person, to begin smoking cigarettes. I do believe, however, that permitting States and localities to ban event sponsorship would spell the end of many worthwhile cultural events, particularly those geared to minority groups. We cannot take away a source of pride and entertainment for thousands of people on the dubious assumption that it will change anyone's smoking habits.

We must continue to address the issue of youth smoking, but not through censorship of information and disruption of legitimate business practices. Moreover, organizations should be permitted to make independent decisions to accept funding from the tobacco industry, or any other legitimate sponsor, without government restrictions or harassment.

Thank you.

ROY SESSIONS, MD
Professor and Chairman
Department of Otolaryngology--Head and Neck Surgery
Georgetown University Medical School
Washington, DC

Mr. Chairman, my name is Dr. Roy Sessions, and I am Professor and Chairman of the Department of Otolaryngology--Head and Neck Surgery at Georgetown University Medical School. I have been asked to articulate the position of the American Academy of Otolaryngology--Head and Neck Surgery on the ever-increasing threat to our society from smokeless, rather than smoking, tobacco and to offer the Academy's endorsement of S 1883, the "Tobacco Product Education and Health Protection Act of 1990."

It is altogether appropriate at this time of our social development that the United States Congress is addressing the case of the tobacco industry-vs-the U.S. citizens. Hardly a day goes by without some matter regarding societies' intolerance of tobacco products being featured in the published or spoken media. More and more, issues such as passive smoking and its subsequent alteration of the airspace are brought up. It is becoming increasingly inconvenient for people to smoke. Clearly the time is right for the Congress to act on the wishes of the country in this matter.

Public health and the impact of ill health are also of increasing concern to our country. The number of deaths, the amount of chronic illness, and the cost of both to the system is staggering. When the impact upon the work place is factored in, the actual cost is incalculable.

We specifically would like to commend you for your leadership and for including Section 928, "Public Education Regarding Smokeless Tobacco." I come here today, Mr. Chairman, bearing a warning against this new health threat, the insidious threat of smokeless tobacco.

The American Academy of Otolaryngology--Head and Neck Surgery is the parent political and educational organization of that specialty

that takes care of most of the cancers of the head and neck. As such, this organization represents a group of doctors who have a growing concern over the increasing use of this cancer causing tobacco. The effects of chewing tobacco are the same as all tobacco, but the dangers to health are even more insidious than smoking. I use the word insidious because of the simple fact that many people believe smokeless tobacco is a safe alternative to smoking, which it is not.

Make no mistake about it, the youngsters of America have proven vulnerable to the seductive ads featuring idolized sports heroes "placing a pinch between cheek and gum." The sponsorship of racing car events, the rodeos, and the subtle but powerful picture of a major league baseball player performing before a national TV audience with a wad of tobacco in his cheek are but a few examples of youth directed advertisements. Youthful vulnerability to such temptations is substantiated by the fact that over 50% of smokeless tobacco users started before their 12th birthday. In some states, there is substantial use of this product in children as early as the third grade. Somehow, the tobacco industry has convinced a large number of our youngsters that there is a macho appearance to walking down a high school hallway with an obvious tin of smokeless tobacco in the hip pocket of their blue jeans. Insidious threat?--Yes!

Danger to health?--Yes! Those of us who treat head and neck cancer feel strongly that smokeless tobacco can and does cause mouth cancer. In fact, the same dangerous nitrosamines found in smoking tobacco are significantly more concentrated in smokeless tobacco.

Also, when the nicotine enters the blood stream its harmful chemicals affect the cardiovascular and digestive systems and create an even more pronounced addiction or dependency than smoking.

So that you do not underrate the seriousness of mouth cancer, almost 50% of the 30,000 new oral cancers diagnosed in the United States each year go on to die of that disease. We predict that if the present rate of smokeless tobacco usage in the United States continues, the number of mouth cancers that will ultimately be seen in the current generation of using youngsters will dramatically increase. Essentially, if we educate our young about the evils of smoking, but at the same time we allow the tobacco industry to convince them that smokeless tobacco is a safe alternative, we will be trading lung cancer for mouth cancer. Additionally, because the cravings related to dependency on smokeless tobacco are the same as with smoking, a person who manages to stop the former is much more likely to start smoking.

It is worth pointing out that people who have been addicted to both smokeless tobacco and cigarettes consistently say that it is much more difficult to stop using smokeless tobacco. These observations are substantiated by reports from behavioral modification clinics that report a much lower success rate with smokeless tobacco users.

In watching this whole smokeless tobacco issue develop over the last five years, I am struck by a sense of deja vu; with the tobacco industry bobbing and weaving around the fundamental issues; with wide-eyed innocence denying their efforts to corrupt young Americans; their play with the words such as dependency, addiction and

habituation; and finally their attempt to dispute the repeated evidence and observations showing a linkage between smokeless tobacco and such ailments as mouth cancer, dental disease, heart disease, and others. The medical profession was shamefully slow to convince the public just how harmful smoking was, even though evidence had been mounting for years. Hopefully, we won't make that mistake again. We have labeled smokeless tobacco for what it really is--a hazard to public health and as such, a creator of human misery and a potential economic drain on our society.

I will close by leaving with you the following facts:

- There are more than 12 million smokeless tobacco users in the U.S., 3 million of whom are under the age of 21.

- Over the past decade, sales of smokeless tobacco have increased an average of 11 percent per year.

- From 1978 to 1984, production of snuff increased 56% and production of chewing tobacco increased 36 percent.

- Sales of oral snuff in the U.S. by tobacco companies rose from 240 million cans in 1976 to 480 million cans in 1985.

- A National Institute on Drug Abuse survey indicated 27 percent of males age 12 through 20 used smokeless tobacco in 1985.

- A 1990 survey conducted by the American Academy of Otolaryngology--Head and Neck Surgery found that as many as four million U.S. male teenagers are largely unaware that health problems are commonly associated with smokeless tobacco, and some are potentially fatal.

- Use of smokeless tobacco among college athletes is up 40 percent over the past four years.

- Over 60 percent of college baseball players use smokeless tobacco.

- Twenty-two percent of college men are snuff users.

The American Academy of Otolaryngology--Head and Neck Surgery thanks you for the opportunity to testify in support of this most important legislation, S 1883. Our "Through With Chew" public education campaign is now in its second year. As a result of our members and materials, our health warning about smokeless tobacco has reached millions of young Americans through their schools and community organizations. But our campaign is not enough to thwart this menace to public health; legislation is needed so that further resources are committed to eliminating this threat. Again, I want to commend you for your leadership, Mr. Chairman, in this effort to protect the American citizens' health.

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March 27, 1990

Senator Edward M. Kennedy
Committee on Labor and Human Resources
Dirksen Building 424
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

I am sorry that I will be unable to attend the hearings on April 3. In lieu of doing so, I am writing to respond to your request for my views on the constitutionality of section 955 of S. 1883.

In essence, section 955 would repeal existing federal law insofar as it preempts state and local regulation of advertising of tobacco products. I believe that for at least two reasons, section 955 of S. 1883 raises no serious constitutional issues.

The first and more fundamental reason is that section 955 would restrict no speech. It would merely repeal a federal statutory prohibition on the enactment of state and local laws. Since section 955, standing by itself, would not regulate speech, it could not violate the first amendment. The second reason that section 955 raises no serious issue is that under existing law, it is highly probable that Congress has the constitutional authority to ban all advertising of cigarettes.

Let me spell out these conclusions in somewhat more detail.

1. Section 955 does not regulate speech at all. It is entirely noncoercive. All that it does is to eliminate a federal prohibition on state and local regulation of cigarette advertising. It is possible, though unlikely, that such regulation (when and if it occurs) would be unconstitutional. But even if this is so, the state and local regulation would be unconstitutional -- not the elimination of federal preemption.

To put it another way: If section 955 is an unconstitutional restriction on speech, then the federal government is under a constitutional duty to preempt all state laws that would, if and when enacted, regulate speech. That proposition would be very hard indeed to sustain. Quite generally, Congress has left the states entirely free to regulate speech, including commercial speech. The federal government rarely prevents the states from regulating the advertising of alcohol, automobiles, cereals, and

aspirin -- not to mention speech relating to obscenity, libel, bribery, "fighting words," or scientific speech.

In these and other contexts, the first amendment is not violated by the absence of federal preemption. When the first amendment is violated, it is the existence of unconstitutional state laws that creates the problem. In a nutshell: Since section 955 bans no speech, it cannot violate the first amendment.

It is irrelevant to this conclusion that after the enactment of section 955, states might enact laws that would violate the first amendment, or produce laws that would, as a practical matter, make it impossible for cigarette companies to advertise. If any state laws regulate constitutionally protected speech, they will be struck down -- like any unconstitutional state law. The federal government does not violate the first amendment when it fails to preempt even unconstitutional state laws.

This conclusion follows naturally from the Supreme Court's decisions in the general area of "ripeness." In the ripeness cases, the Court has established that laws will not be struck down merely because they might, at some time and in the future, give rise to genuine restrictions on speech. Time and again, the Court has said that it will not strike down government action unless and until such action shows "specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1 (1982) (emphasis added).

In the Laird case, for example, a class of people challenged a program by the U.S. Army that was alleged to involve the surveillance of lawful political activity by civilians. According to the plaintiffs, the Army was involved in an ongoing process of investigating and reporting on meetings, speakers, and other matters. The Supreme Court said that the case was not justiciable in the absence of "specific actions" taken by the Army against the plaintiffs. See also United States v. Mitchell, 330 U.S. 75 (1947) (refusing to enjoin Hatch Act on the theory that the plaintiffs had not shown a real interference with their rights).

In fact, section 955 is considerably easier than Laird or Mitchell. In those cases, it would have been possible to argue that the actual government action under challenge by itself imposed a serious chilling effect on speech. Section 955, if enacted, would do no such thing. It would merely remove a congressional disability on the states. Any chilling effect would be created by state laws, if and when they are enacted. The mere prospect of state laws that have not yet been enacted cannot be said to violate the first amendment. It is such laws, not section 955, that would raise constitutional questions.

2. Even if section 955 did regulate cigarette advertising, it would probably be constitutional. Indeed, I believe that under current law, the first amendment would not bar an across-the-board federal prohibition on any and all cigarette advertising.

By far the leading case is Posadas del Puerto Rico v. Tourism Co., 478 U.S. 328 (1986). In that case the Court was faced with Puerto Rican measures restricting the advertising of casino gambling, when the advertising was aimed at the residents of Puerto Rico. The Court said that the constitutionality of a restriction on non-misleading and non-fraudulent advertising of a lawful activity would depend on (a) whether the government has a "substantial interest" in regulation, (b) whether the restrictions directly advance those interests, and (c) whether the restrictions are no more extensive than necessary to serve that interest.

In Posadas, the Court answered all of these questions in the affirmative. Its answers argue strongly in favor of the constitutionality of a government ban on cigarette advertising. According to the Court, the state had a substantial interest in avoiding the serious harmful effects of casino gambling on Puerto Rican residents, including an increase in corruption and a disruption of "moral and cultural patterns" Id. at 341. Moreover, the Court said that the government's belief that the advertising ban would decrease casino gambling was "a reasonable one" verified by the fact that the plaintiff had been willing to litigate so strenuously. Id. at 342. It did not matter that other kinds of gambling were not regulated. Finally, and critically, the Court said that the legislature was under no obligation merely to engage in "counterspeech," but instead could conclude that "residents of Puerto Rico are already aware of the risk of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct."

In passages that directly support the constitutionality of a cigarette advertising ban, the Court stressed that "the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." Id. at 345-4 (emphasis added). For the Court, "it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." The Court noted that statutory "regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition . . . to legalization of the product or activity with restrictions on stimulation of its demand" (emphasis added).

Insofar as Posadas indicates that restrictions on commercial speech need not be the "least restrictive means" of controlling the harm, it was vigorously and unequivocally reaffirmed in Board of Trustees v. Fox, 57 U.S.L.W. 5015 (1989). There the Court refused to invalidate on its face a decision by a state university to ban the sale of lawful products on university

premises. See also Minnesota Newspaper Ass'n v. Postmaster General, 677 F. Supp. 1400 (D. Minn. 1987) (upholding a federal ban on use of mails to send newspapers containing advertisements for lotteries); Dunagin v. City of Oxford, Miss., 718 F.2d 728, 751 (5th Cir. 1983) (upholding a ban on liquor advertising, and cited with approval in Posadas). Dunagin relied in part on the Twenty-First Amendment, which allows states to ban the importation of intoxicating liquors. See also California v. LaRue, 409 U.S. 109 (1972). But most of the court's analysis tracked the ordinary commercial speech approach, and it was that analysis, not the reliance on the Twenty-First Amendment, that the Supreme Court cited with approval in Posadas.

Posadas probably means that Congress could ban cigarette advertising if it wanted to do so. If Posadas is to be distinguished, it might be on any of three grounds. Each of these grounds, however, is unpersuasive.

a. It might be argued that the government lacks the constitutional power to ban cigarette smoking. If this is so, Posadas is inapposite, since that case turned on the government's power to ban casino gambling. There is, however, little question that the government could ban the sale and smoking of cigarettes if it so chose. The government has broad power to regulate in the social and economic sphere so long as its decisions are "rational," see Williamson v. Lee Optical, 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963). Indeed, the government already bans many foods and drugs that are thought to pose a risk to public health. There would be serious objections to a government ban on cigarettes, but those objections would not be constitutional in nature.

b. The legislation at issue in Posadas actually legalized an activity that (a) had theretofore been illegal and (b) is in fact illegal in the majority of the states. Perhaps a state can bar advertising of a product that it is simultaneously permitting for the first time, or perhaps a state can do so if, but only if, the activity is one that has historically been or is currently banned. With respect to cigarettes, of course, neither of these conditions holds.

It is doubtful, however, that this distinction is a plausible one. The emphasis in Posadas was on the fact that cigarette advertising could persuade people to engage in conduct that the legislature believed to be harmful both to them and to the community at large. The same is true of cigarette advertising -- or at least Congress could so find. The fact that cigarette smoking has always been legal does not bear at all on this issue. In other words: It is true that Posadas involved an activity that had previously been illegal and that is illegal in many states, but this fact was not important to the Court's conclusion. Instead the Court said that the power to ban casino gambling necessarily included the power to ban advertising of that activity -- a conclusion that would apply here as well.

c. Perhaps Posadas could be thought to turn on the peculiar fact that Puerto Rico was attempting to ensure that tourists would use its casinos, but simultaneously to protect its own citizens against gambling. The factual situation in the case was in this sense quite unusual. Puerto Rico wanted to gain the revenues from tourism that casino gambling would bring, but it also wanted to ensure that its citizens would engage in their normal activities rather than in gambling. This odd combination of goals has no parallel in the context of cigarette advertising. If Congress banned such advertising, it would be attempting to protect all citizens against the persuasive force of the speech; there was no such attempt in Posadas.

This argument does not, however, furnish a good basis for distinguishing between Posadas and a government ban on cigarette advertising. It is true that Puerto Rico had an odd constellation of goals, but that fact did not play a role in the Court's reasoning, and indeed it is very hard to see how it could have done so. The Posadas Court emphasized that the greater power to ban the product included the lesser power to ban advertising, at least where significant harms were thought to follow from advertising. It is that conclusion that is critical here.

I conclude that after Posadas, a government ban on cigarette advertising would in all likelihood be upheld. Of course it is conceivable that the Supreme Court would overrule Posadas, but that would be most surprising.

An additional note. I know that some people are concerned about the consequences of Posadas, and of government bans on commercial advertising, for the general principle of freedom of speech. But it is important to recall that for almost all of the nation's history, commercial speech received no protection whatsoever. There is absolutely no evidence that the framers of the original Constitution (or of the fourteenth amendment) thought that commercial speech should receive any protection at all. Indeed, in 1942, a unanimous Court -- including not merely Justices Frankfurter and Jackson, but also Justices Black and Douglas, the most vigorous defenders of the free speech principle in the nation's history -- said that it was "clear" that the Constitution does not restrain government's power over commercial advertising. Valentine v. Chrestensen, 316 U.S. 52 (1942).

This ruling represented the law until the mid-1970s. It was not until that very recent date that the Court established that advertising would sometimes receive protection. See Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In this light, one might see the Posadas principle -- the government may restrict commercial advertising of products that it might also ban, if it has a substantial reason for doing so and if the restriction will serve that purpose -- as fully consistent with broad and generous principles of free expression as those

principles have been understood within our constitutional tradition.

To defend section 955, however, it is not necessary to explore these more general issues. Section 955 bans no speech. It is therefore constitutional.

If I can be of any further assistance, please do not hesitate to contact me. Best regards.

Sincerely,

Cass R. Sunstein
Karl N. Llewellyn Professor
of Jurisprudence
Law School and Department of
Political Science

CRS/nbi

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April 2, 1990

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

We have reviewed a letter addressed to you by the American Civil Liberties Union, in which the ACLU states its opposition to Section 955 of your tobacco regulation bill, S. 1883. As set forth in greater detail in the attached rebuttal to that letter, it is plain that the ACLU's opposition to Section 955's repeal of a portion of the federal preemption against state and local government regulation of tobacco advertising is based on mere speculation and a misconstruction of Supreme Court precedent regarding "commercial" speech.

The ACLU seeks to have it both ways. On the one hand, it contends that freedom of speech should be protected. On the other hand, it uses the exercise of free speech by tobacco control advocates as a basis for arguing that tobacco advertising should be given unique protection against state and local regulation ("tobacco is uniquely the target of efforts to ban or curtail commercial speech regarding it"). The ACLU contends that consumer products such as toothpaste and hairspray--which are not considered particularly lethal or addictive items--do not require the special protection that is somehow deserved by tobacco, a product that is responsible for 390,000 deaths a year in the United States and the addiction of 50 million of its users.

The ACLU's reasoning leads to the bizarre conclusion that since tobacco is uniquely harmful, it deserves unique protection from potential regulation!

American Heart Association

AMERICAN LUNG ASSOCIATION
The Christmas Seal People®

AMERICAN CANCER SOCIETY®

As you know, our review of the First Amendment issues surrounding tobacco regulation clearly leads us to the conclusion that it is constitutional, reasonable and necessary to restrict the advertising and promotional practices of this industry.

We reject the ACLU's untenable position, and applaud you, once again, for introducing this sensible and workable legislation.

Sincerely,

Fran Du Melle
Director of Government Relations
American Lung Association

Scott D. Ballin
Legislative Counsel and Vice President for Public Affairs
American Heart Association

John H. Madigan, Jr.
Assistant Vice President for Public Affairs
American Cancer Society

/ced

ACLU OUT OF TOUCH WITH REALITY ON CONSTITUTIONALITY OF REGULATING TOBACCO ADVERTISING

The American Civil Liberties Union has sent a letter to Senator Kennedy opposing Section 955 of his legislation S. 1883, the "Tobacco Product Education and Health Protection Act of 1990," arguing that the bill's proposal to remove a federal preemption on the advertising of tobacco products would 'impede the First Amendment rights of advertisers.'

The Coalition on Smoking OR Health (American Lung Association, American Heart Association, American Cancer Society) has reviewed the arguments set out in the letter and offer the following rebuttal comments.

1. ACLU: "In our view, any effort to revoke federal preemption of the regulation of tobacco advertising would likely lead to a plethora of new advertising requirements by state and local governments. This entirely predictable result will significantly impede the First Amendment rights of advertisers of lawful tobacco products to create national advertising campaigns."

REBUTTAL: The Supreme Court has indicated unequivocally that advertising of products deemed by a state, local or federal legislature to be

harmful can be banned or restricted in lieu of banning the sale of the product. In this case, the ACLU must concede that neither Section 955 nor S. 1883 bans or restricts tobacco advertising. Instead, the ACLU speculates about potential state or local government regulation of tobacco advertising, and speculates--probably erroneously--about how the Supreme Court would rule on such regulation. Speculation simply does not constitute a basis for opposing the repeal of the preemption in question. The ACLU offers no basis for its contention that a uniquely harmful product, responsible for more deaths each year in the United States than the combination of AIDS, alcohol, murders, suicides, automobile accidents, fires, crack cocaine and heroin, should be entitled to unique protection by Congress. Congress has not preempted state and local government regulation of advertising for any other consumer product. Finally, repeal of the preemption against state and local regulation would not constitute "encouragement" by Congress to enact unconstitutional legislation. Regardless of what the ACLU considers "entirely predictable," repeal by Congress of the preemption against state and local regulation clearly would be constitutional, as well as good public policy.

2. ACLU: "We believe that Section 955 invites state and local governments to attempt to control the content of tobacco advertising. In our view, efforts by states to regulate the manner in which tobacco is advertised (through prohibitions of color, models, scenery, or regulation of the size of

advertising, for example) will ultimately be deemed violative of the First Amendment."

REBUTTAL: Section 955 does not "invite" any action whatsoever. It simply repeals a portion of the current preemption against state and local regulation of tobacco advertising. No such preemption exists for state and local regulation of other consumer products in this country, even though tobacco causes far greater harm to consumers and places a far greater burden on our economy than any other consumer product. Assuming that state or local government regulation of tobacco advertising were to follow enactment of Section 955, such regulation would very likely be upheld by the Supreme Court, which has stated unequivocally that advertising of products deemed by a legislature to be harmful can be banned or restricted in lieu of banning the sale of the product. In any case, neither Section 955 nor S. 1883 in any way bans or restricts tobacco advertising.

3. **ACLU:** "It was frequently mentioned at your recent hearings on tobacco that tobacco is a unique product. It is true that it is treated in special ways by the federal government. Moreover restrictions on its use and advertising are the subject of increasingly creative efforts by antismoking groups and legislators who support them."

REBUTTAL: The reality is that the 'uniqueness' related to tobacco lies in the unparalleled weakness of federal laws governing the regulation of this nation's number one preventable killer. Tobacco products have been exempted under every major health and safety law enacted by Congress to protect the health of its citizens including the Consumer Product Safety Act, Toxic Substances Act, Fair Labeling and Packaging Act, Hazardous Substances Act and Controlled Substances Act. Contrary to the ACLU's claims of being called "creative efforts," actions taken by groups such as the Coalition on Smoking OR Health to change the laws, are designed to bring tobacco in line with the way in which we regulate other consumer products in this country. This includes both the removal of the existing federal preemption law to give the states the right to protect their citizens as well as efforts to bring tobacco under the jurisdiction of a federal regulatory agency for health and safety purposes.

4. ACLU: "Unlike other products such as toothpaste or hairspray, for which federal law does not theoretically prevent imposition of local advertising restrictions, tobacco is uniquely the target of efforts to ban or curtail commercial speech regarding it."

REBUTTAL: It is because of the unique dangers of tobacco as a major addictive killer of Americans that the state and local authorities should be given the rights to protect their citizens as is the case for other products. If toothpaste and hairspray were products responsible for the deaths of

390,000 Americans, it would not be surprising to see both federal and state governments taking the necessary action to protect the public's health. Whether the ACLU wishes to acknowledge the facts or not, such authorities and rights presently exist for other products and are not "theoretical" as they would have us believe. It is partially because the federal government has failed to take an active role in regulating tobacco products that states should be allowed to take the necessary steps to curtail the advertising practices of the tobacco industry. The long line of Supreme Court decisions in this area, whether or not the ACLU wishes to accept them, recognize and reenforce the rights of government to restrict or even ban commercial speech to protect its citizens. One would be hard pressed to come up with a more suitable example than that of tobacco, which is more deserving of advertising regulation.

5. ACLU: "Current health warning messages do not violate the First Amendment and this system should not be supplemented by a mix of new state and local restrictions."

REBUTTAL: First, the legislation is not intended to remove the requirements for a federally mandated health warning. Second, it is hypocritical for the ACLU to not only oppose attempts to ban or restrict advertising but to also advocate that state and local governments be prohibited from imposing other requirements that are designed to protect their citizens. Clearly this smacks of suppression of speech and is contrary to the role of government in protecting the health and welfare of its citizens.

SECRET DOCUMENT LEAKED AT CONFERENCE

PERTH (April 2) - Delegates to the Seventh World Conference on Tobacco and Health were greeted with a gift from an unusual source -- the tobacco industry. A secret industry document describing how to prepare for and respond to anti-tobacco groups was being circulated to various conference attendees by an anonymous source.

Entitled "A Guide for Dealing with Anti-Tobacco Pressure Groups," the document describes an "early warning alert system" to enable the industry to recognize "danger signals" that give an "early warning of an attack" and "enable the industry to develop appropriate plans." The document also provides a "Pro- Forma Action Plan" to help guide the industry in preparing "for an attack."

The 10 page guide, dated October 1989, was prepared by Infotab, a London-based consultant for the tobacco industry.

Among the Key Indicators that the document refers to as danger signals of imponding attack from anti-tobacco advocates are:

* "The setting up of a Regional Workshop of activists;"

* "The presence of activist group(s) and key individuals, e.g. Garfield Mahood, Michael Pertschuk, Judith Mackay;"

[NOTE: Garfield Mahood is executive director of Canadian Nonsmokers' Rights Association in Toronto; Michael Pertschuk is co-director of the Advocacy Institute in Washington and former chairman of the Federal Trade Commission; Judith Mackay is director of the Asian Consultancy for Tobacco Control in Hong Kong.]

* "The setting up of a non-smokers' rights association, e.g. USA, Canada;" and

* "The starting up of an anti's coalition, and its development. Especially dangerous is the calling of a press conference by the coalition."

Part of the document's "Pro-Forma Action Plan" is the recommendation to:

* "Monitor the presence of known activists, e.g. Mahood. CRITICAL." [emphasis in the original]

* "Monitor any non-smokers' rights organisations."

* "Set up a national pro-smoking alliance." and

* "Using research polls and surveys to attack the credibility of activists. Then merchandising favourable opinion."

The document also outlines a communications plan "to be undertaken through all appropriate media and PR channels with DISPROPORTIONATELY high spending levels." [emphasis in the original]

Michael Pertschuk, one of the activists named in the report and who was in Perth for the Conference, noted that "There is a real aspect of dirty tricks about the document's contents, such as advice to 'monitor the

presence of activists,' which really means tailing them. It's reminiscent of General Motors spying on Ralph Nader."

Dr. Judith Mackay, another activist named in the report,

Return for more:
said that she was "flattered to the point of distraction" to be so named.

The Seventh World Conference on Tobacco and Health is being held in Perth, Western Australia from April 1 - 5. It is being attended by 1,000 delegates from over 70 countries.

####

Coalition on Smoking OR Health

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The Honorable Edward M. Kennedy
Chairman
Senate Committee on Labor and
Human Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510-6300

Dear Senator Kennedy:

On behalf of the Coalition on Smoking OR Health, comprised of the American Heart Association, the American Lung Association and the American Cancer Society, we submit the enclosed document for inclusion in the record of your hearing on "The Tobacco Product Education and Health Protection Act of 1990," which was held on April 3, 1990.

Entitled "A Guide for Dealing with Anti-Tobacco Pressure Groups," the document describes an "early warning alert system" to enable the tobacco industry to recognize "danger signals" that give an "early warning of an attack" and "enable the industry to develop appropriate plans." The guide, dated October 1989, was prepared by Infotab, a London-based consultant for the tobacco industry.

While representatives of the tobacco industry and the advertising industry seek to exploit the First Amendment to justify their unconscionable marketing practices, the enclosed document demonstrates one of the ways in which the tobacco industry seeks to dampen freedom of both speech and association. For example, the guide sets forth a "Pro-Forma Action Plan" which recommends that tobacco companies "monitor the presence of known activists," calling this activity "CRITICAL" (emphasis in original). Citing highly respected individuals, such as Garfield

Mahood of Canada, Michael Pertschuk of the United States and Dr. Judith Mackay of Hong Kong, the guide recommends the "using [of] research polls and surveys to attack the credibility of activists," and "then merchandising favourable opinion." In short, the guide strongly suggests that far from promoting freedom of speech and association, the tobacco industry engages in efforts to harass those who are dedicated to making known the truth regarding the health consequences of tobacco use and the efforts of the tobacco industry to target children, minorities, young women, blue-collar workers and the less-educated in their marketing and promotional efforts.

This document came to light at the recent Seventh World Conference on Tobacco and Health convened in Perth, Australia. We appreciate your consideration in introducing it into the record.

Sincerely,

Fran Du Melle
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Coalition on Smoking OR Health
Director of Government Relations
American Lung Association

Scott D. Ballin
Legislative Counsel and Vice President for Public Affairs
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John H. Madigan, Jr.
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American Cancer Society

FDM/ro
Enclosure

A:CED\KENNEDY

A GUIDE FOR DEALING WITH ANTI-TOBACCO PRESSURE GROUPS

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INFOTAB

October 1989.

1. INTRODUCTION

Recent industry experiences have given strong indications that the industry sometimes has difficulty in recognising the danger signals of approaching attacks.

Analysis of the background to these attacks enables the identification of a number of frequently occurring events and activities. We have called these "key indicators", and when grouped together they form an EARLY WARNING ALERT SYSTEM.

The next section of this Infotab guide outlines the key indicators. Whilst local experience and practice will show variations, it is recommended that you identify the key indicators existing in your own country and decide whether your NMA, or other industry group, is sufficiently alert to future attacks.

The last section emphasises the ne to draw up an action plan to meet future attacks. A PRO-FORMA ACTION PLAN is outlined to hel industry groups prepare their own detailed local plans.

Neither the Early Warning Alert System nor the Pro-Forma Action Plan should be taken as comprehensive. They are designe to act as checklists and guides to help formulate your own plans.

2. EARLY WARNING ALERT SYSTEM

Attacks on the industry are often preceded by a number of danger signals. Prompt recognition of these signals can help significantly in giving early warning of an attack, and enable the industry to develop appropriate plans. The first stage is to recognise the danger signals – we have called them KEY INDICATORS:

2.1 The presence of a *WHO Regional Office or sub-office*.

2.2 The presence of an *IOCU* office or local cell.

2.3 The setting-up of a *Regional "Workshop"* of activists, e.g. Asia/Pacific (Taipei), Latin America (Caracas), Europe (Madrid), Middle East (Baghdad).

2.4 The presence of *activist group(s)* and *key individuals*, e.g. Garfield Mahood, Michael Pertschuk, Judith Mackay.

2.5 The setting up of a *non-smokers' rights association*, e.g. USA, Canada.

2.6 The starting up of an antis' *coalition*, and its development, e.g. Canada, New Zealand, Scandinavia. Especially dangerous is the calling of a press conference by the coalition.

Coalition recognition characteristics:

- professional/career activists with an anti-tobacco background
- medical/health groups as core
- ethical flash-point. Once a certain number of medical groups join, then others will follow
- mobility, e.g. use of the New Zealand Toxic Substances Board report in Norway by National Council on Smoking and Health Chairman (Bjartveit), a red-hot activist. Also used in US Congressional hearings.

2.7 The availability of *existing* or *enabling legislation*, e.g. Ireland and New Zealand, to give government power to act without further legislation.

2.8 The publication by the antis of a *discussion document* proposing draft legislation, e.g. New Zealand "Tobacco Control Act 1989".

2.9 The publication of an *IOCU-backed* industry attack, e.g. *Smart Promotion*, Sweden.

2.10 The holding of the WHO *World No-Tobacco Day*. This will be exploited by the antis and linked with national anti-smoking proposals.

Grouped together these key indicators present a formidable array of danger signals. Some, of course, represent serious attacks in their own right, but each key indicator should be regarded as potentially dangerous. On a local basis, there may well be other key indicators that will alert you to an attack.

Recommendations

1. Check your own country/market for the existence of any of these key indicators.
2. If you are able to identify any key indicators, or several of them, then review with your local industry group the need for preparatory work as part of an action plan.

3. PRO-FORMA ACTION PLAN

There is much that can be done to prepare for an attack. One or more key indicators should alert industry groups to developing an action plan, and to taking preparatory steps. Once the attack develops, then there are a further series of steps to be taken, building on the earlier preparation.

This section outlines a PRO-FORMA ACTION PLAN – in two parts:

- Preparatory work
- Do it now!

3.1 Preparatory Work

Can we learn from the antis own lessons? If we know how the antis think, then what can we do to prepare? In Canada in 1988, during the political campaign leading to severe restrictions, the anti-smoking Coalition learnt these lessons:

- apply pressure on the industry
- go "head-to-head" in arguments with individuals
- exploit public opinion
- never underestimate opponents
- mobilize membership
- define the battleground
- know the value of ethical coalition
- discredit opponents
- use insiders
- use the whole network
- realise that "we have the power!"

These are lessons for the industry to learn also! In our own preparatory work, actions should be directed to:

- Discovering what *powers* government ministers have? – is there existing or "enabling" legislation which gives the government power to act without introducing new legislation?
- Identifying the *legislative routes* and political procedures/ timetable? What are the lobbying opportunities?
- Getting to *know personally*:
  - key political contacts – Ministers, bureaucrats, advisers
  - media/advertising groups (are you a member?)
  - sports organisations
  - pro-smoking groups
  - freedom/liberty groups
  - business groups
  - trade organisations
  - trade unions
  - academic institutions
  - Who are they? What are their *attitudes*? Keep an up-to-date file on attitudes of parliamentarians (including the opposition)
  - Identifying the *common ground* with all these groups – it won't be the same
  - DO NOT WAIT UNTIL A PROBLEM ARISES – make friends with them now – find out their interests and support these.
- Continually monitor the WHO/ IOCU offices/cells in your country.
- Monitor the presence of known activists, e.g. Mahood. CRITICAL!
- Monitor the formation of any *anti-smoking coalition*. Anticipate its use to launch and co-ordinate attacks.
- Monitor any non-smokers' rights organisations.
- Set up a national *pro-smoking* alliance.
- Form a lobby/alliance on *freedom/ liberty*.
- Maintain industry views in the media. DO NOT WAIT UNTIL THE CASE IS MADE AGAINST YOU AND MINDS ARE MADE-UP!
- *Select* a PR agency and advertising agency with up-to-date knowledge of the political process and experience in advocacy campaigning.
- Prepare/acquire *argumentation* on key issues. You don't have to start from the beginning – most argumentation already exists.
- Remember, if you are an NMA executive your members all have other priorities. *You must be the one* to focus their minds on the significance of the key indicators.

3.2 Do It Now!

When specific smoking control proposals are about to be made, or have been made, and assuming you have taken preparatory action – what then?

This next section details pro-forma steps to building up a local industry group Action Plan.

A GUIDE FOR DEALING WITH ANTI-TOBACCO PRESSURE GROUPS

3.2.1 Background

Key factors are likely to include:

- deterioration of the *social climate*
- proposals to ban *advertising and sponsorship*
- a *tax* increase
- a draft bill on *ETS*
- the establishment of an *antis' coalition*
- coalition support of others' initiatives
- exploitation of *WHO 'World No Tobacco Day'* by the antis
- key *political dates*, e.g. a general election
- *global implications* of one country's regulations cascading through others — effects on marketing freedoms, intellectual property and volume
- *constitutional/legal* implications of proposal
- *urgent* need to prepare campaigns and submissions for use in the immediate short-term
- need to *mobilise* global industry resources urgently (human and financial)
- availability of *industry resources*

3.2.2 Objective and Strategy

The objective is TO OVERTURN THE PROPOSALS.

Strategic considerations are likely to be determined by:

- *identifying opportunities* to delay further restrictions/regulations/ legislation
- taking advantage of opportunities to present the media and other target groups with *industry arguments*
- *lobbying action* with target audiences
- examining *political procedures* and protocol to determine probable decision points and establish campaign timings
- giving a *political angle* to arguments by exploiting the political sensitivity of parliamentarians and the power of smokers as voters and other interested groups.

3.2.3 Political Timetable

There will be a need to prepare URGENTLY for the *"worst case"* political scenario. Refinement of the political timetable will enable a detailed Action/Communications Plan to be determined.

The antis' coalition will have its own timetable to gain maximum value from political protocol. The industry must assume the "worst case" scenario and that it will be heavily exploited by the coalition.

3.2.4 Outline Plan

Steps to consider for inclusion in your own plan include:

Targets for industry arguments (those you have made friends with in your preparatory work):

- key Ministers and Civil Servants/ bureaucrats
- Cabinet committees
- political party caucus/research units
- business, trade, and popular media including international business media
- smokers (smokers are voters!)
- suppliers, agencies, sports organisations, unions, employees, retailers/wholesalers, growers
- key local political representatives
- international business and advertising communities and organisations

Forming *industry lobby* groups and alliances with associated interests, with the core arguments of freedom/ liberty.

Preparing a *detailed attack* on antis' proposals to use with your targets. Identifying/briefing scientific, medical and advertising/sponsorship authorities/organisations (including WFA and IAA). Producing a *pro-active stand-alone brochure* covering similar issues, with a general populist approach.

Maintaining industry identity and arguments in the public's mind by continuing with *existing media campaigns* but at a heavier weight. This will help to put pressure on politicians by letting them see that they cannot get away with confidential discussions behind closed doors.

Developing a *direct media campaign* aimed at specific proposals to continue from existing campaigns, a high spend level. Do not depend on editorial coverage (even if possible) but invest in media space to enable your arguments to be detailed as you want them, at the time you want. Supplement with PR and political campaigns.

Using *research polls* and surveys to attack the credibility of activists. Then merchandising favourable opinions.

3.2.5 Timing

A CAMPAIGN HAS TO RUN LITERALLY AS SOON AS POSSIBLE. Key lobbying actions need to be undertaken by industry leaders and by industry alliances and lobby groups, complementary to advertising campaigns. Campaign timings need to be compatible with political decision points.

Amongst the materials/activities to consider preparing are:

- *briefings*/literature for target groups
- *mailings* (use advertisement proofs) to target groups
- *press release*/press briefings, including major press conferences to launch new studies.
- *letter writing campaign* to local political representatives by electorate members
- *photo opportunities* for media presentation of industry case (use in national and local media)
- media *interviews* by industry leaders and third-party representatives
- *advertisements* – by industry and by alliances (merchandise the advertisements in mailings)
- *features* attacking the credibility of key coalition activists
- *video conference* of world experts/ authorities in your country
- *petitions* from smokers and retailers to government ministers
- *new studies*, e.g. economic impact study of the effect of proposals on jobs, revenue, trade. Introduce through media conferences and into media advertising.

3.2.6 Communications Plan

The requirement will be based on maximising the impact of industry and third party arguments through political, media and PR opportunities for countering the proposals. To be undertaken through all appropriate media and PR channels with *disproportionately* high spending levels.

Key factors are:

- stress the industry's role in *jobs and revenue*, and draw attention to the biased and unfair manner in which the proposals were drawn up.
- *discredit* the often imported activists of the coalition – ideally through third parties.
- *persuade smokers* to make their views known to political representatives.
- draw attention to the *havoc* to be brought to your country's business and its reputation in the international business media.
- stimulate *media interviews* to complement media advertising campaigns.
- appeal to the public's *common sense*, and sense of fair play. Use this to pressurise politicians.
- use *petitions* to local political representatives by interested groups and present this in advertisements.
- integrate all advertising and PR activities with the common purpose of bringing political (i.e voters) pressure on local political representatives – *take your case to the public* to make politicians listen!

3.2.7 Resources

The local industry will need:

- a *dedicated organising team* and support staff to brief, direct and co-ordinate.
- *executives* with political and lobbying experience to plan, co-ordinate and brief industry leaders. Also to select and brief PR and advertising agencies.
- an *experienced PR consultancy*, (briefed earlier) used to PR and lobbying programmes and their integration with advertising campaigns. Also to give advice on strategy and on political contacts.
- *a creative advertising agency* (briefed earlier) with experience of advocacy campaigning. Also to give advice on strategy.
- *local industry executives* to execute the briefing and lobbying programme.

- company *head and local office support* of budget requirements – CRITICAL!
- *industry resources* to provide key argumentation on proposals and co-ordination of scientific and advertising responses.

If you are an NMA executive you will have thought of all, or some of this, at some time. If you have not been attacked yet, then you have time to set up the preparatory work – *if you do this you have a real chance of tackling the proposals at draft stage.*

Recommendations

1. Review your own industry group's preparations for an attack. Are they sufficient? What more could you do? Are your head office members, and Infotab, alerted to the situation?
2. Prepare your own industry group action plan – DO IT NOW!

ANPA
TO ADVANCE THE CAUSE OF A FREE PRESS

American Newspaper Publishers Association

Mailing Address: Box 17407 Dulles Airport, Washington, D.C. 20041
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The Boston Globe

Richard J. Warren
Bangor (Maine) Daily News

George W. Wilson
Concord (N.H.) Monitor

Jerry W. Friedheim
President

March 22, 1990

The Honorable Edward M. Kennedy
SR-315 Russell Senate Office Building
Washington, DC 20510

Dear Senator Kennedy:

The American Newspaper Publishers Association, a national trade association representing more than 90 percent of the daily and Sunday newspaper circulation in the United States, opposes Section 955 of the "Tobacco Product Education and Health Protection Act of 1990" (S. 1883). As we note in our enclosed Comments, Section 955 is inconsistent with First Amendment guarantees and wise public policy favoring free speech in the commercial marketplace of ideas.

Section 955 could lead state and local legislatures to create a patchwork of tobacco advertising regulations that — as a practical matter — would result in the elimination of all commercial expression concerning tobacco, a controversial, but lawful product.

ANPA believes that Congress should continue the wise public policy it established 25 years ago when it preempted state and local regulations over tobacco advertising through the Federal Cigarette Labeling and Advertising Act. That policy recognizes the national nature of tobacco advertising and that regulation of national advertising requires national uniformity.

ANPA, on the other hand, supports the approach taken in Section 911 of S. 1883. Government funding of public information campaigns regarding tobacco use and health will encourage the kind of robust debate and exchange of information which is vital to our free society.

We, therefore, respectfully request that you oppose Section 955 and vote to delete it from S. 1883.

Sincerely,

Jerry Friedheim

Jerry Friedheim

Enclosure

STATEMENT OF

THE

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

The American Newspaper Publishers Association (ANPA) opposes Section 955 of the "Tobacco Product Education and Health Protection Act of 1990". This section[1] would remove federal preemption over state and local regulation of tobacco product advertising. ANPA believes that this removal would interfere with the free flow of information about a controversial, but lawful product.[2].

ANPA represents about 1,400 newspapers — more than 90 percent of the daily and Sunday newspaper circulation in the United States. The Association also includes a substantial portion of the non-daily newspaper circulation. ANPA consistently has defended the First Amendment right to speak and hear competing voices in the marketplace of ideas.

Passage of section 955 would lead to a patchwork of conflicting regulations that could result in a de facto advertising ban. In fact, it is hard to understand what purpose the section has other than to encourage the states to create conditions in which it would be impractical for cigarette manufacturers to advertise. The notion that government power should be used to control unwanted behavior by limiting the right to speak about that behavior strikes at the heart of the First Amendment's meaning. That the speech to be

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1 Section 955, in pertinent part, states that:

> "Nothing in ... the Federal Cigarette Labeling and Advertising Act ... or the Comprehensive Smokeless Tobacco Health Education Act ... shall prevent any State or local government from enacting additional restrictions on the advertising, ... of tobacco products to persons under the age of 18, or on the placement or location of advertising for tobacco products that is displayed solely within the geographic area governed by the applicable State or local government, such as advertising on billboards or on transit vehicles, as long as the restrictions are consistent with and no less restrictive than the requirements of this subtitle and Federal law."

2 ANPA's interest in the regulation of tobacco advertising derives from our concern about the impact of such regulation on the free flow of information about all lawful products. Newspaper tobacco advertising revenues are negligible and have been declining steadily. The latest figures available from the Newspaper Advertising Bureau show that only 0.3 percent of all newspaper advertising revenues are derived from tobacco advertising. Passage of Section 955 would have little or no impact on these revenues.

limited is commercial speech about the lawful use of a controversial product does nothing to mitigate the constitutional harm.

Print media are distributed on a multi-state basis. The dissemination of news and advertising, especially national advertising originating throughout the nation, requires continuous interstate transmission of materials and payments. Thus, commercial speech by its very nature is an integral part of interstate commerce. Restricting the flow of tobacco information in one state necessarily will impede the flow of information concerning tobacco in other states[3]. Further, it will be impossible to shield each state from the advertising regulations of other states. Publishers will be forced either to carry only the type of advertising that satisfies the most restrictive state regulation or to avoid such advertising altogether.

ANPA believes that Congress should continue the wise public policy it established almost a quarter of a century ago that favors the free exchange of commercial information. In the late 1960's, it decided that a multiplicity of State and local regulations pertaining to cigarette labels and advertising could create "chaotic marketing conditions and consumer confusion."[4] Congress repeatedly expressed its determination "to avoid the chaos created by a multiplicity of conflicting regulations" by preempting state and local regulation of cigarette[5] advertising and of smokeless tobacco advertising[6]. It wisely recognized that the regulation of national advertising requires national uniformity.

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3 Although states and localities currently regulate the advertising of consumer products or services, such as automobiles or contractor services, these regulations generally control pricing information and other local marketing practices of local businesses. Tobacco advertising, on the other hand, involves the offering of products for sale on a national scale. It generally originates from national manufacturers, not local businesses.

4 S. Rep. No. 195, 89th Cong., 1st Session. 4 (1965); H.R. Rep. No. 449, 89th Cong., 1st Session. 4 (1965)

5 S. Rep. No. 566 91st Cong., 1st Session. 12 (1969). *See also* Cigarette Labeling and Advertising: Hearing on H.R. 6543 before the Consumer Subcommittee of the Senate Committee on Commerce, 91st

Good public and constitutional policy still favors the free exchange of commercial information. Our Supreme Court continues to recognize the importance of commercial speech to our society. *See e.g., Board of Trustees of the State University of New York v. Fox,* 109 S. Ct. 3028, 3034 (1989); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 647 (1985). State or local suppression of all truthful speech about lawful tobacco products would frustrate this policy of free exchange — a policy encouraged by Section 911 of S. 1883[7].

ANPA supports the approach taken in Section 911 of S. 1883 to encourage more speech about tobacco. Free and informed consumer choice depends upon the informational value of commercial speech. Depriving citizens of the information needed to make a free choice is not a permissible way to "dampen" the use of tobacco products. *See Central Hudson Gas and Electric Corporation v. Public Service Commission of New York,* 447 U.S., 557 at 574 (1980)(Blackmun, J., concurring in judgment). However, experience has shown that "in the aftermath of the broadcast ban on cigarette commercials, the number of informational messages on smoking and health was also reduced". *See* Federal Trade Commission, "Staff Report on the Cigarette Advertising Investigation" (May 1981) at 5-5.

Cong., 1st Session. 103 (1960)(Sen. Magnuson)(advertising issue is "a national matter"); *id.* at 120 (Sen. Goodell)(need for federal preemption "so you don't have to deal with State and local regulations"); *id.* at 130

6 15 U.S.C. §4406 (1986)

7 Section 911, in pertinent part, states that:

> "The Center [for Tobacco Products] shall make grants to, or enter into contracts with entities ... to conduct public information campaigns concerning the use of tobacco products. Entities eligible to receive grants... shall ...provide public information campaigns regarding tobacco use and health, through the use of --
>
> (A) public service announcements;
> (B) paid advertising messages; and
> (C) counter advertising to provide the public with information to counter the messages in tobacco advertisements that promote tobacco use;
>
> that are designed for television, radio and print media, billboards, and public transit advertising that shall warn youth and other individuals, ... concerning the health and safety risks of tobacco use"

Thus, the de facto ban resulting from Section 955 might tend to reduce the amount of health messages encouraged by Section 911.

ANPA believes that it would be bad public policy for Congress to remove federal preemption over state and local regulation of tobacco advertising. Removing federal preemption would allow multiple state and local advertising regulations that would have the practical effect of an outright advertising ban. Government bans on the advertising of lawful products are contrary to our tradition of robust speech and debate to assure an informed citizenry.

We therefore respectfully request that this Committee delete Section 955 from S. 1883.

CALIFORNIA STATE UNIVERSITY, LONG BEACH
DEPARTMENT OF SPEECH COMMUNICATION, MHB 717
(213) 985-4301

March 16, 1990

The Honorable Edward M. Kennedy
Senate Committee on Labor and
Human Resources
SD 438
Washington, D.C. 20510-6300

Dear Senator Kennedy:

As President of the Freedom of Expression Foundation, I have testified before several Senate and House Committees regarding the First Amendment status of commercial speech. I was called before those committees because of my special expertise regarding the First Amendment and the protection it affords to all speech. Currently, I am also Professor and Chair of the Communications Department here and Director of the Center for First Amendment Studies for the campus. My resume is enclosed to indicate my research and academic credentials on this topic.

Given these qualification, I am requesting that the enclosed testimony be included in the record of your hearing on S. 1883 on April 3, 1990. I am particularly concerned about the provision of the bill which would repeal the federal pre-emption of state rules. As I'm sure you know, the First Amendment freedoms we enjoy were encorporated by the Fourteenth Amendment so that we would be protected on the state as well as the federal level.

Thank you for your kind consideration on this matter. And my best to Tom Rollins of your staff.

Sincerely,

Craig Smith

cc: Senator Bob Packwood

ALL SPEECH IS CREATED EQUAL

by

Craig R. Smith
President, Freedom of Expression Foundation
Professor, Communications, California State U., Long Beach

The Declaration of Independence holds "these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness."[1] The Colonists fought a revolution to secure individual rights and civil liberties, and enshrined them in a written constitution to ensure that no government could ever take them away.

The First Amendment of that Constitution guarantees the right of free expression to all Americans. It reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[2] Although every word spoken or printed originates in the human thought process, the Founders failed to recognize explicitly the simple fact that, in addition to men and women, all speech is created equal. Unfortunately, this omission has allowed the government to categorize speech according to the message and the medium used to disseminate it, and to extend varying degrees of First Amendment freedom to the different categories. Words appearing as opinion in print are accorded greater protection than those same words when read as part of the evening newscast. Moreover, advertisements for contraceptives and abortion clinics are protected by the Constitution while ads for cigarettes and casinos are subject to restrictions imposed by the Congress, the regulators and the courts. Whether or not one agrees with this policy, one must examine the rationale for establishing these different categories, to understand what kind of speech is included in each of the categories, and to know precisely how much protection that speech is accorded. Such an analysis should motivate those affected by these restrictions, including large and small corporations, advertisers, and the public at-large, to eliminate all artificial distinctions used to categorize speech. After all, if you take the time to read the newspapers printed in 1791, the year the First Amendment was added to the Constitution, you'll see that the papers the Founders chose to protect from government interference are filled with advertisements for all sorts of products. Commercial speech was not a separate category of discourse in the minds of the Framers of the Constitution.

Let me focus on the commercial/non-commercial categorization of speech in my testimony.[3] Particular attention will be given to the commercial speech doctrine, under which product advertising was stripped of First Amendment protection. Supreme Court decisions from Valentine v. Chrestensen decided in 1942 to Posadas v. Tourism Co. of Puerto Rico,[4] decided in 1986, will be explored.

A. NON-COMMERCIAL SPEECH

Non-commercial speech is another name for issue-oriented or political speech. This category includes expression concerning public affairs, candidates for public office, government operations, and other elements of the democratic process. It

appears as campaign rhetoric, editorial comment, and legislative debate. The Founders, who were strongly influenced by enlightenment thinking, considered political expression to be the purest form of speech, and therefore accorded it the greatest degree of First Amendment protection.

The idea that political speech had to be protected at any cost dates back to Colonial days, during which the press and the public were not allowed to express themselves freely on matters of public concern. The King and his government often used restrictive measures, such as licensing of printing presses and the doctrine of seditious libel, to silence unfavorable public comment.[5] After America won its independence, it repudiated the laws which allowed the King to stifle the free flow of ideas.[6] The Supreme Court has recognized that the protection of political speech was of paramount concern to the Framers of the First Amendment, and that the Amendment itself was a direct response to the "persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light . . . the agencies and operations of government."[7]

Protection of political speech advanced two important democratic goals: 1) an informed citizenry that would be capable of making educated decisions on matters of public concern, and 2) a free and open marketplace of ideas wherein the truth would ultimately prevail. Because the government was based on "the opinion of the people," Thomas Jefferson argued that public opinions must be fully informed.[8] Only through a vigorous and spirited public debate could citizens be educated about the actions of their government and react responsibly. The press was essential to the process. On this subject, Jefferson once remarked: "No experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact, that man may be governed by reason and truth. Our first object should therefore be, to leave open to him all the avenues to truth. The most effectual hitherto found, is the freedom of the press."[9]

Benjamin Franklin believed that the search for truth was at the heart of establishing the right to free expression and that this goal could be achieved only through the promotion of an unlicensed and uncensored press. In "An Apology for Printers," which appeared in the Pennsylvania Gazette on June 10, 1731, Franklin noted philosophically: "That the Opinions of Men are almost as various as their faces; an Observation general enough to become a common Proverb, So many Men so many minds." Franklin believed that it was a printer's duty to provide space for the discussion of public issues, at least to those who were willing to pay for it: "Printers are educated in the Belief, that when Men differ in Opinion, both sides ought equally to have the Advantage of being heard by the Public; and that when Truth and Error have fair Play, the former is always an overmatch for the latter: Hence [printers] cheerfully serve all contending Writers that pay them well, without regarding on which side they are of the Question in Dispute."[10]

Justice Oliver Wendell Holmes is recognized as having definitively stated the rationale for according the highest degree of protection to the discussion of ideas: "[T]he ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."[11]

On many occasions, the Supreme Court has emphasized the importance of political speech to our pluralistic society. In Garrison v. Louisiana,[12] Justice Brennan declared that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[13] In Cohen v. California, [14] Justice Harlan was more philosophical:

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[15]

In Buckley v. Valeo[16] the Court asserted:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[17]

More recently, the Court reaffirmed that "speech on matters of public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special pro- tection."[18]

Corporate speech concerning matters of public importance is also protected as political, non-commercial speech, according to the Supreme Court.[19] Moreover, editorial advertisements concerning matters of public importance are protected by the First Amendment regardless of whether the comments promote the economic interest of the corporate speaker.[20]

The Supreme Court recently reaffirmed this position on corporate non-commercial speech. In Pacific Gas and Electric v. Public Utility Commission of California,[21] the question was whether a state regulatory agency could require a privately owned utility to include the speech of third parties, with which it disagreed, in the utility's monthly billing envelopes. Pacific Gas and Electric ("PG&E") had for the past 62 years distributed a newsletter to its three million customers in its billing envelopes.[22] The newsletter included political editorials, feature articles, tips on energy conservation, and information on

rates and services.[23] In 1980, a special interest group petitioned the State Public Utility Commission arguing that PG&E should not be allowed to distribute political editorials at the ratepayers' expense.[24] The California PUC ruled that any "extra" envelope space was ratepayer property, and it required PG&E to allow outside groups to use the extra space to raise funds and disseminate counter editorials.[25] PG&E believed that its First Amendment rights had been violated and appealed to the U.S. Supreme Court.

The Supreme Court sided with Pacific Gas and Electric, holding that speech does not lose its protection because of the corporate identity of the speaker.[26] Forcing PG&E to provide space in its envelopes for the expression of particular views with which it disagreed was "antithetical to the free discussion that the First Amendment seeks to foster."[27] Moreover, the Court stated that PG&E had "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."[28]

On the regulatory front, corporations recently won another victory for editorial non-commercial speech when an Administrative Law Judge (ALJ) dismissed a complaint of the Federal Trade Commission against the R.J. Reynolds Tobacco Company.[29] R.J. Reynolds ran a newspaper advertisement which discussed health questions surrounding the use of tobacco products. The FTC brought a complaint under Section 5 of the FTC Act for deceptive advertising. The ALJ stated that Reynolds' "cigarettes and science" advertisement was "clearly an editorial," and "not commercial speech by any stretch of the imagination."[30] As such, the ALJ determined that Reynolds' ad was not subject to the FTC's Section 5 jurisdiction, which allows the FTC to regulate commercial speech that is false, misleading or deceptive. Moreover, the ALJ asserted: "[E]ditorial or noncommercial speech, such as Reynolds' ad, does not lose the full protection of the First Amendment simply because it contains inaccurate or incomplete information, or some language which may arguably be construed or misconstrued to imply a promotional message, or some other message regarded by complaint counsel to be contrary to the public interest or otherwise objectionable."[31]

B. COMMERCIAL SPEECH

Although defining commercial speech has not been easy, it is generally recognized as advertising that does no more than solicit a commercial transaction.[32] The courts have generally treated this speech differently than fully protected non-commercial speech, despite the fact that the Framers of the First Amendment never made such a distinction in any of America's formal documents. Contemporary historians have argued that the Founders were not simply trying to protect political speech; they were, after all, merchants, farmers, inventors, men of commerce who believed that making a living was essential to the pursuit of happiness.[33] Commercial advertising pervades the eight daily newspapers that

were published in America in 1791 at the time the First Amendment was ratified. Advertising was certainly recognized by the Framers as an important avenue for pursuing one's livelihood. Interfering with the livelihood of a colonist was something that our Founders pledged their sacred honor to prevent.

Nevertheless, commercial speech is subject to government restrictions that would be unconstitutional if applied to most non-commercial speech. Indeed, until recently, commercial speech enjoyed no protection at all under the First Amendment. The Supreme Court articulated this policy in Valentine v. Chrestensen[34] in 1942. Chrestensen involved a New York businessman who was arrested for distributing handbills advertising a submarine exhibition. New York City's Sanitary Code explicitly provided dichotomous treatment of commercial and non-commercial speech: it forbade the distribution of commercial and business advertising material but permitted the distribution of handbills devoted to "information or public protest."[35] Chrestensen's double-faced handbill consisted of both a commercial solicitation and a protest against the City Dock Department for refusing to provide wharfage facilities for his exhibit. But the Court held that the purpose in affixing the protest to the handbill was to evade the prohibition of the ordinance and that "[i]f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."[36] In conclusion, the Court emphatically declared that the First Amendment simply did not apply "as respects purely commercial advertising."[37]

Chrestensen gave rise to the commercial speech doctrine, which holds that speech promoting goods and services is less deserving of constitutional protection than speech promoting issues or ideas. As late as 1973, the Supreme Court was still adhering to this two-tiered approach. In that year the Court ruled that although newspapers have editorial discretion to select and place advertisements, that discretion did not allow them to publish commercial ads if their placement violated a local ordinance proscribing employment discrimination.[38]

In 1975, the Court departed from this bipolar approach and recognized that commercial speech should be accorded some First Amendment protection. In Bigelow v. Virginia,[39] the Supreme Court overturned the conviction of a Virginia newspaper editor who was found guilty of running advertisements for a New York abortion referral service at a time when abortions were illegal in Virginia. One reason the Court decided to extend limited protection to these advertisements was because it believed that Virginians had a right to receive the information. The Court rejected the contention that an advertisement for abortion services was unprotected because it was commercial: "Our cases . . . clearly establish that speech is not stripped of First Amendment protection merely because it appears in that [commercial] form."[40]

By rejecting the "rigid two-tier typology" of Chrestensen, the Court in Bigelow made clear that simply labeling expression as

"commercial" did not end the matter. Instead, it began an inquiry into how much protection such speech is entitled to, or how much regulation could be imposed by government. That inquiry is essentially a balancing test, which the Court described as "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."[41] Bigelow did not answer this inquiry explicitly other than to note that "advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." Although Bigelow marked the first movement away from the commercial speech doctrine, the precedential value of the case was questionable because the advertisement at issue did contain non-commercial information of public interest.[42]

If there were any doubts as to the viability of Chrestensen, however, they were put to rest the following year in the landmark case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.[43] In Virginia Pharmacy, the Supreme Court reaffirmed Bigelow in the context of a purely commercial advertisement. Virginia Pharmacy involved a group of consumers who argued that the First Amendment prohibited the State from banning advertisements carrying prescription drug prices. The State claimed that this regulation of commercial speech was necessary to maintain high professional standards for pharmacists. Rejecting the State's asserted interest, the Court said that the essential issue was not whether this regulation was well-intentioned, but rather, whether the speech being regulated was protected by the First Amendment. The Court went on to reject the idea that commercial speech "is wholly outside the protection of the First Amendment."[44] While the Court did not accord such speech full protection under the Constitution, it repudiated "the highly paternalistic view that government has complete power to suppress or regulate commercial speech."[45] The end result, however, was the creation of a second-class status for commercial speech -- granting such speech some, but not complete, protection.

Virginia Pharmacy thus rejected the premise of the commercial speech doctrine as enunciated in Chrestensen -- that commercial advertising may be regulated on the same terms as any other aspect of the marketplace. Even though the advertiser's interest is purely "economic," the Court wrote, "that hardly disqualifies him from protection under the First Amendment."[46] The Court also recognized in Virginia Pharmacy that consumers had a right to receive commercial information: "As to the particular consumer's interest in the free flow of consumer information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[47] Moreover, in commenting on Virginia's desire to encourage its citizens to patronize "professional" pharmacists by suppressing price information, the Court demonstrated a sophisticated grasp of how the market for information works:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will

> perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[48]

The state's regulatory goals were meant to raise public esteem for the profession, encourage more small pharmacies, and lessen the demand for potentially dangerous drugs. While these goals were well-meaning, the state's regulatory approach -- an outright advertising ban -- was detrimental to consumers.

If one side of the coin is limited protection, the other side is limited regulation. Bigelow declared that commercial speech may be subject to "reasonable" regulation. Virginia Pharmacy mentioned some of the ways in which commercial speech may be restricted as to time, place, and manner.[49] Advertising that proposes illegal activities can be banned; untruthful or misleading speech may be restricted.[50] Moreover, the First Amendment does not prohibit government "from insuring that the stream of commercial information flow cleanly as well as freely."[51] So there should be no question that States and the Federal Government can regulate and restrict advertising in the same manner that they restrict unlawful and deceptive business practices, such as fraud and swindling. What the Court faced and overruled in Virginia Pharmacy, however, was not regulation of commercial speech, but its complete suppression. This, the Court ruled, was impermissible under the Constitution whenever the speech was truthful and concerned legal activity.

Four years after the Court decided Virginia Pharmacy, it articulated standards for determining the degree of commercial speech regulation that was permissible. In Central Hudson Gas v. Public Service Commission,[52] the Court announced a four-part test for evaluating the constitutionality of restrictions on commercial speech. The first part established criteria for determining whether commercial speech was protected at all. To be entitled to protection, such speech "must concern lawful activity and not be misleading."[53] The next three parts articulated standards for determining the degree of regulation permissible: "whether the asserted governmental interest is substantial," second "whether the regulation directly advances the governmental interest asserted," and third "whether it is not more extensive than is necessary to serve that interest."[54]

In Central Hudson Gas, a State Public Service Commission regulation prohibited all public utility advertising that promoted the use of electricity.[55] The state argued that this ban on commercial advertising was supported by the national policy favoring conservation of energy resources.[56] In applying their four-part test, the Supreme Court held that this regulation was far more extensive than necessary to promote conservation.[57] The Court noted that some promotional advertising would have no effect on energy consumption.[58] The total suppression of public utility advertising was more than was necessary to promote energy conservation.[59]

The last part of the Central Hudson Gas test is probably the

key to the Court's thinking on this issue and best summarizes the relevant standard. Commercial speech enjoys protection but a degree of regulation may be allowed which is in proportion to the governmental interest it promotes -- no more than is necessary to accomplish the task.

The Court reaffirmed the Central Hudson Gas standard in 1982. In In re RMJ, the Court elaborated on how much regulation may be imposed in an attempt to halt false or deceptive advertising. It established a standard analogous to a sliding scale where the degree of regulation is proportional to the degree of deception.[60] The remedy may be no more restrictive than necessary.

Given the great strides made in recent years to elevate the status of commercial speech, the Supreme Court's decision in Posadas v. Tourism Company of Puerto Rico[61] surprised many constitutional scholars. Posadas involved a challenge to the constitutionality of a Puerto Rico statute that restricted advertising of casino gambling in the local publicity media. In an effort to deter gambling by residents while encouraging gambling by tourists, Puerto Rico authorized casinos to advertise their "games of chance . . . through newspapers, magazines, radio, television and other publicity media outside Puerto Rico."[62] Thus, casinos in Puerto Rico were free to advertise to tourists in official tourist guides and in outside media such as the New York Times or network television, but not to local inhabitants, who were by law permitted to gamble in local casinos.

After noting that the particular kind of commercial speech at issue in the case concerned a lawful activity and was neither misleading nor fraudulent, the Supreme Court applied the four-part test it had established in Central Hudson Gas. The Court found that the government of Puerto Rico had a substantial interest in reducing the demand for casino gambling by local residents because gambling tended to disrupt family units, foster prostitution, and increase local and organized crime.[63] The Court held that the restrictions on advertising directly advanced the government's interest because advertising served "to increase the demand for the product advertised."[64] Moreover, the Court asserted that the advertising restrictions were no more extensive than necessary to serve the government's interest in reducing demand for casino gambling.[65]

The most curious aspect of the five to four decision in Posadas is that the majority departed from the Court's earlier precedents, which held that the government could not ban the advertising of lawful products or services. In Posadas the Court narrowed the extent of the constitutional protection accorded commercial solicitations by allowing a government to prohibit the advertising of any lawful product as long that government possessed the greater power to ban the underlying activity promoted in the advertising.[66] Moreover, the Court declared: "It would . . . be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of

demand for the product or activity through advertising on behalf of those who would profit from such increased demand."[67] The Court regarded an advertising ban as a valid "intermediate kind of response" that was not prohibited by anything in the First Amendment.[68] Accordingly, for the advertising to be fully protected, the underlying activity had to be constitutionally protected. Contraceptives and abortion clinics were two examples cited by the Court where the government could not prohibit the advertising.[69]

Thus, despite the consumer's interest in receiving information relating to lawful products and services, an interest which was recognized in Virginia Pharmacy as being "as keen, if not keener by far, than his interest in the day's most urgent political debate," the regulators and the courts treat commercial and non-commercial speech differently for purposes of the First Amendment.

III. IMPLICATIONS

Posadas may be read to say that any product advertisement can be banned if the government has the power to ban the product itself. The Court has already indicated that advertisements for contraceptives and abortion clinics could not be banned because the ads provide information about an activity that is constitutionally protected. But what about products or services that are not directly protected by the Constitution?

Just as there are different categories of speech, there are different categories of products. The majority of consumer products fall into the legal/useful/harmless category. The government has no substantial interest in banning the advertising of products within this category, for example, shampoo and ball point pens. Hundreds of brands of shampoo compete for consumer dollars. Advertisements may emphasize price, or a particular quality the shampoo provides, such as "shiny hair," "more body," or "less dandruff." While shampoo might sting if if gets in one's eyes and could be dangerous if taken internally, interests of this nature are not substantial enough to justify an outright ban on shampoo advertising, which would remove valuable information from the consumers who are looking for a shampoo to achieve a particular result for their hair. Moreover, if a product is legal/useful/harmless for the purpose that it is sold, for example, using a ball point pen to write or draw, the fact that it could be used for some other purpose, for example, using that same pen as a dagger, would not justify a government ban on pen advertisements.

Another group of products is categorized as legal/harmful/beneficial. Casino gambling, the subject of the advertising ban in Posadas, would fall into this category because, while it is arguably harmful because it may increase local and organized crime and disrupt family units, it is also arguably beneficial because it promotes tourism and is a form of recreation. Under a broad reading of Posadas, the government could ban the advertising of a legal/harmful/beneficial product if the government demonstrates

that the ban is likely to reduce the demand for that product. The fact that the product has some beneficial aspects seems irrelevant to the Court.

Such a reading of Posadas would have broad implications for manufacturers, distributors, and advertisers of products, which, over the last few years, have been the subject of medical reports suggesting potential harm to consumers. For the most part, these products are not inherently harmful. The harm comes from excessive use. For instance, eggs are a good source of protein, but they are also high in cholesterol. Eating too many could contribute to heart disease. Salt contains sodium, which is a mineral essential to maintaining good health, but too much sodium may cause high blood pressure. Coffee and tea help people relax, but they contain large doses of caffeine, which is a known carcinogen. Under a broad reading of Posadas, the government could ban the advertising of these legal/harmful/ beneficial products as an intermediate step to the outright ban of the product itself.

Thus, a broad reading of Posadas would allow the government to institute an outright ban on the advertising of legal products if the government could demonstrate that such a ban would reduce excessive use of the product; regardless of whether the harms resulting from excessive use outweighed the benefits derived from normal or responsible use. For example, recent medical studies by insurance companies and Johns Hopkins Medical School indicate that persons drinking in moderation (2 drinks per day) are healthier than persons who do not drink at all! A 1986 study funded by the National Institutes of Health found that moderate alcohol consumption "is associated with an overall reduction in the risk of coronary heart diseases." These findings prompted the American Heart Association to revise its Dietary Guidelines to reflect that "moderate alcohol consumption may result in beneficial effects on cardiovascular disease." Excessive intake of alcohol is harmful, but such intake is an abuse of a normally health-enhancing product. Thus, a government ban of alcohol advertising might reduce the use of a health- enhancing product, while trying to reduce excessive use of the same product.

Should the government introduce such a ban, advertisers of these products could address important public issues in their advertisements, which would afford them First Amendment protection and thereby allow them to be published by the print media. But the same step would effectively preclude these ads from being accepted by the electronic media because they would trigger the fairness doctrine!

A hypothetical example serves to illustrate the point. Assume that the State of Oklahoma finds that eggs are harmful because their excessive intake leads to heart disease. The State does not want to ban sales of eggs, rather, it seeks to reduce the excessive use of eggs by enacting a statute prohibiting the advertising of eggs in newspapers and magazines, and on local radio and television stations. The Local Yolkal Company sues the State of Oklahoma contending that the advertising ban violates its First Amendment rights. The case goes to the Supreme Court and it upholds the

advertising ban based on Posadas. What can the Local Yolkal Company do to advertise its product to the consuming public?

Since the decision in Posadas applies only to purely commercial speech, the Local Yolkal Company can circumvent the restrictions by using an issue-oriented approach in its advertisements. It can run advertisements responding to the government's assertion that eggs are harmful, for instance, presenting evidence which demonstrates that eating eggs in moderation is actually beneficial to one's health. By raising an important public issue, the advertiser steps out of the product market into the marketplace of ideas and renders Posadas inapplicable. The Local Yolkal Company can then advertise in the print media.

After reviewing the Court's earlier decisions extending increased protection to commercial speech, particularly Virginia Pharmacy and Central Hudson Gas, Justice Brennan stated:

> I see no reason why commercial speech should be accorded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity.

Brennan would apply "strict judicial scrutiny" to government actions seeking "to suppress the dissemination of nonmisleading commercial speech relating to lawful activities, for fear that recipients will act on the information provided." Moreover, Brennan believed that the majority had misapplied the Central Hudson Gas test when they endorsed the reasonableness of the government's position that casino gambling was a substantial evil.[70] Brennan noted that Puerto Rico had legalized gambling casinos and allowed its citizens to patronize them; therefore, the legislature had already determined that serious harm would not result if residents were allowed to gamble.

Furthermore, Brennan argued that it was "unclear whether banning casino advertising aimed at residents would affect local crime" or the other "serious harmful effects" that the legislature sought to control.[71] To Brennan, Puerto Rico's ban on advertising clearly violated the First Amendment.

Justice Stevens concentrated on the discrimination engendered by the advertising ban. Stevens found that "Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed."[72] Stevens noted the irony of the Puerto Rican law which authorized the promotion of casino gambling to tourists and simultaneously prohibited advertising aimed at the local population:

> Perhaps, since Puerto Rico somewhat ambivalently regards a gambling casino as a good thing for the local proprietor and an evil for the local patrons, the ban on local advertising might be viewed as a form of protection against the poison that Puerto Rico uses to attract strangers into its web. If too much speech about the poison were permitted, local residents might not only partake of it but also decide to prohibit it.

In Stevens' view, that "discrimination among publications, audiences, and words" fostered by this advertising ban clearly violates the First Amendment.

Justice Stevens' dissent calls forth a long line of decisions, Bigelow, Virginia Pharmacy, and Central Hudson Gas, which sought to ensure a free flow of commercial information from the manufacturer or distributor to the consumer concerning legal products and services. It makes sense, for all concerned, that if it is legal to manufacture and sell a product, it should be legal to tell people that it exists, that it has merits over its competitors, or simply that it is available. Moreover, if some legal products can be advertised while others are subject to government restrictions, then some advertisers would be treated unequally, depriving them of their right to life, liberty and the pursuit of happiness. Such unequal treatment is inimical to the spirit of the Founders, and the Fifth and Fourteenth Amendments.

Even if the dissents in Posadas don't carry the day, it is clear that the majority's decision can be limited to the case's unique set of facts. Indeed, a close reading indicates Posadas can be distinguished from the line of cases which have established protection for commercial speech. First, the decision by Justice Rehnquist reaffirms that restrictions on commercial speech cannot be sustained unless they "directly advance" a substantial government interest and that interest cannot be served and/or achieved by "less restrictive" means. Second, casino gambling is illegal in most of the United States and subject to severe restrictions even in Puerto Rico. Therefore, in this unique case, a ban on advertising is simply an extension of that government's policy to discourage its citizens from partaking of a service it means to provide only to tourists.

Third, the majority opinion tells us that Posadas must be read in the context of Puerto Rico's economic development legislation with its "unique cultural and legal history" and its political relationship with the United States. Unlike, previous cases concerning regulations enacted by State governments, Posadas was a challenge to the constitutionality of a statute of the Commonwealth of Puerto Rico, and the Court seemed quite reluctant to use the strict scrutiny advocated by Justice Brennan in his dissent because it would infringe on the sovereignty of Puerto Rico and damage its well-planned economic development program, part of which was attracting tourists to the island with the lure of casino gambling.

In addition to these political and economic reasons for distinguishing this case, the Court's decision made clear that the advertising restrictions were very limited, and they did not make it impossible for local residents to obtain information about gambling, if they so desired. In short, the Puerto Rican law made circumvention of the ban simple and therefore, had only a slight chilling effect on the speech of casino owners.

Clearly, there is no analogy here with the advertising of broadly available legal products. For them, the rationale of

Virginia Pharmacy still rings true: Information is not inherently harmful, and in a democracy like ours, the people are trusted to perceive their own best interests, without the need for government protection. For the government to step in and take advertising options away from consumers is patronizing at best and unhealthy at worst. The fact is the advertising of lawful products is in the best interests of consumers. Take beer and wine as an example. First, beer and wine advertising provides a way by which consumers become familiar with products that can serve as alternatives to hard liquor. Second, beers with lower calorie counts, so-called "light beers," are better for some consumers not because of their alcohol content but because of their use in weight reduction. Weight reduction helps prevent heart disease. It would have been impossible for those products and their healthier effects to have broken into the consumers' awareness, let alone win a share of the marketplace, without advertising. Third, the introduction of low-alcohol products, such as LA Beer, would have been impossible without radio and television commercials. Ironically, the government's goal of reducing alcoholism and drunk driving would be retarded by a ban on the advertising of these products. Virginia Pharmacy found that the answer to alleged abuses of some legal products is not to punish the innocent consumer who uses advertising to help make rational decisions about the marketplace and his own health needs. The solution lies not in paternalistic regulations, but rather in protecting the free flow of commercial information.

Conclusion

The commercial speech doctrine was wisely laid to rest in Bigelow, Virginia Pharmacy, and their progeny. Government regulation of commercial speech is detrimental to consumers. Moreover, businesses have a keen interest in protecting their rights to convey information to consumers regarding their lawful products and services. In a democratic society like ours, paternalistic restrictions on this flow of information harms consumers and the businesses that serve their needs. Protections that have been extended to commercial speech should be strengthened, not cut back, and all efforts to ban or suppress advertising of legal products should be fought.

Thomas Jefferson's dream for a democratic republic was premised on an educated voting public that could partake of the free marketplace of ideas. Jefferson's dream can only become a reality in a society where freedom of expression is guaranteed for all communicators. That's why we must re-establish a First Amendment environment as soon as possible.

Free expression is the foundation for all our other rights and liberties. But some expression is more free than others because different levels of First Amendment protection have been accorded to different categories of speech. Yet all speech should be afforded equal treatment unless the government can demonstrate that the speech itself is harmful. Whether it is printed or broadcast, whether it concerns how much a product costs or presents a particular editorial view, it is speech pure and simple under the First Amendment. To say that some speech is more valuable than others assumes that the government can impose a hierarchy on human thought. We all place different values on things, and speech is no exception. With speech, however, America currently allows these value judgments to be made by the Congress, the regulators and the courts. Until such time as they change the law, the study of free expression will always require categorical analysis.

END NOTES

1. The Declaration of Independence para. 2 (U.S. 1776).
2. U.S. Const. amend. I.
3. There are other categories of speech, e.g., obscenity, see Miller v. California, 413 U.S. 15, 23 (1973), libel, see New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), fighting words, see Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), picketing, see Thornhill v. Alabama, 310 U.S. 87, 104-05 (1940), and espionage, see Schenck v. United States, 249 U.S. 51 (1919), which are accorded different levels of protection.
4. 54 U.S.L.W. 4956 (U.S. July 1, 1986).
5. See Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 1st Sess., Print and Electronic Media: The Case for First Amendment Parity, 4-13 (Comm. Print 1983) (staff report submitted by the National Telecommunications and Information Administration) [Hereinafter "Print & Electronic Media"]; see also F. Siebert, Freedom of the Press in England, 1476-1776, at 41-63, 86-87, 116-26 (1965).
6. See Near v. Minnesota, 283 U.S. 697, 713-14 (1931); Bridges v. California, 314 U.S. 252, 263-64 (1941).
7. Grosjean v. American Press Co., 297 U.S. 233, 245 (1936).
8. The Writings of Thomas Jefferson: Being His Autobiography, Correspondence, Reports, Messages, Addresses, and Other Writing, Official and Private 98, 99-100 (1853).
9. Letter to Judge John Tyler from Thomas Jefferson, June 28, 1804, reprinted in Thomas Jefferson Writings (M. Peterson ed. 1984).
10. C. Rossiter, Seedtime of the Republic: The Origin of the American Tradition of Political Liberty 300 (1953).
11. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion by Holmes, J., joined in Brandeis, J.). It was Holmes who coined the phrase "free marketplace of ideas."
12. 379 U.S. 64 (1964).
13. Id. at 74-75.
14. 403 U.S. 15 (1971).
15. Id. at 24.
16. 424 U.S. 1 (1976) (per curiam).
17. Id. at 14, quoting Roth v. United States, 354 U.S. 476, 484 (1957).
18. Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 53 U.S.L.W. 4866, 4869 (U.S. June 26, 1985), quoting Connick v. Meyers, 461 U.S. 138, 145 (1983).
19. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 562 n.5 (1980).
20. See, e.g., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 (1983); Bigelow v. Virginia, 421 U.S. 809, 818 (1975); Ginzburg v. United States, 338 U.S. 463, 474 (1966); Thornhill v. Alabama, 310 U.S. 88 (1940).

21. 106 S. Ct. 903 (1986).
22. Id. at 905.

23. Id.
24. Id. at 906-07.
25. Id.
26. Id. at 912.
27. Id. (citations omitted).
28. Id. at 911, citing Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976).
29. In re R.J. Reynolds Tobacco Company, Inc., 51 Antitrust & Trade reg. Rep. (BNA) 219 (Aug. 7, 1986).
30. Id. at 221. Reynolds' ad did not contain any brand name or list prices or show where cigarettes could be purchased. The ad expressed Reynolds' opinion on the efficacy of the multi-risk factor clinical study of heart disease mortality and its relevance to smoking. The ad read: "We at R.J. Reynolds do not claim [the] study proves that smoking doesn't cause heart disease. But we do wish to make a point . . . [that] the controversy over smoking and health remains an open one." Id.
31. Id. The ALJ emphasized that any reasonable person would view the Reynolds ad as an op-ed type piece representing an opinion that might not be entirely accurate. Corporate non-commercial speech, of the type used in the Reynolds' ad, was characterized by the ALJ as "fair comment," which the Supreme Court recognized in Pacific Gas and Electric as protected by the First Amendment. Id.
32. Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 1 (1979).
33. See Anderson, The Origins of the Press Clause, 30 U.C.L.A. L. Rev. 455, 533-37 (1983); see also L. Levy, Emergence of a Free Press vii-xix (1985) (In the preface, Levy acknowledges that his earlier work, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960), "gave the misleading impression that freedom of the press meant to the Framers merely the absence of prior restraints.").
34. 316 U.S. 52 (1942).
35. Id. at 53.
36. Id. at 55.
37. Id. at 54.
38. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 391 (1973).
39. 421 U.S. 809, 822 (1975).
40. Id. at 818.
41. Id. at 826.
42. Id. at 822. The advertisement published in Bigelow's newspaper did more than propose a commercial transaction. It contained factual material of clear public interest. The advertisements included the words "Abortions are now legal in New York. There are no residency requirements."
43. 425 U.S. 748 (1976).
44. Id. at 761.
45. Id. at 762.
46. Id.
47. Id. at 763.
48. Id. at 770.
49. Id. at 771.
50. Id.
51. Id. at 772.
52. 447 U.S. 557 (1980).
53. Id. at 571.
54. Id.
55. Id. at 558.
56. Id. at 559.
57. Id. at 571-72.
58. Id.
59. Id. at 570.
60. In re RMJ, 455 U.S. 191, 203 (1982).
61. 54 U.S.L.W. 4956 (U.S. July 1, 1986).
62. Id. at 4958.
63. Id. at 4960.
64. Id.
65. Id. at 4961.
66. Id.
67. Id.
68. Id. at 4961-62.
69. Id. at 4961.
70. Id.
71. Id. at 4964.
72. Id. at 4965.

The Challenger

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514 Princess St.
Wilmington,NC 28402
(919) 762-1337
1-800-462-0738
FAX (919) 763-6304

P.O. Box 3175
108 Anderson St.• Ste. 9
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(919) 483-8688
1-800-533-7032
FAX (919) 483-9524

April 5, 1990

The Honorable Edward Kennedy
Chairman
Senate Labor and Human Resources Committee
428 Dirksen Senate Office Building
Washington, DC 20510
ATTENTION: Nick Littlefield

Dear Senator Kennedy:

Please include my statement as part of the April 3, 1990 Hearing on S.1883.

Mr. Chairman, Members of the Committe, thanks for receiving my statement and considering it in your deliberation of the above noted bill. I am opposed to the proposed legislation..

While S.1883, may appear valid on its' face, a closer look at the consequence it would have on minorities in business suggests that a heavy burden will be placed on the backs of minority media and workers that depend upon tobacco for their livelihood. You well know that the Minority business community has traditionally been discriminated against in the general business community. Tobacco has served a vital support to many minority businesses that can't compete without it.

While health risk from using tobacco are a valid concern, many other legal pruducts carry very serious health risk. As long a tobacco is a legal product it should be use at the discretion of individual users. It should also be free from advertising restrictions.

Again, I oppose S.1883 and urge you to note this objection to its' passage.

Sincerely yours,

Peter Grear

Peter Grear

PG:ab

STATEMENT OF WILLIAM ELFENBEIN, PRESIDENT
NATIONAL CANDY WHOLESALERS ASSOCIATION
IN OPPOSITION TO S.1883
THE TOBACCO PRODUCT EDUCATION AND
HEALTH PROTECTION ACT OF 1990

April 4, 1990

Mr. Chairman and members of the committee:

On behalf of the National Candy Wholesalers Association (NCWA), I would like to express our strong opposition to S.1883, the Tobacco Product Education and Health Protection Act of 1990. The legislation has serious negative impacts on candy/tobacco wholesale-distributors and their retail customers. Moreover, Its restriction on advertising raises critical constitutional questions. Furthermore, the creation of a duplicative new federal agency is an unwarranted and needless waste of government funds, particularly with the large federal deficit we face.

The National Candy Wholesalers Association is a national trade association with 900 wholesaler distributor members and over 1700 manufacturer, broker, retailer and other associate members. Members are involved with the distribution of confectionery, tobacco, health and beauty aids and other allied products. This segment of the wholesale distribution industry has approximately 4400 establishments with a total annual sales volume in excess of $26 billion and over 69,000 employees. It is an industry composed of a great many small businesses who operate on narrow profit margins.

The legislation has serious negative impacts on wholesale distributors and their retail customers.

As a legal product, the frequent inventory turns from the sale of cigarette and other tobacco products generate significant revenue for wholesale distributors and retailers. This can provide consumer traffic that helps sell other consumer items.

For example, the inventory turnover for cigarettes is about 44 times per year. That compares with 20 turns per year for confectionery and 11 to 12 for groceries, snack foods, health and beauty aids and other similar products offered by wholesale distributors. As a result, cigarettes generate 41% of sales. This contributes 23 percent to profits. That's more than one-fifth of our bottom line.

We are particularly concerned that the various State and local governments could enact unreasonably stringent laws and regulations that could seriously hamper the ability of retailers to sell, and wholesalers to distribute, cigarettes and other legal tobacco products thus raising the cost to distribute. In addition, giving the Federal government the power to seize tobacco inventories and block receipt of new stock could result in chaos in the distribution network of these products and have a significant adverse economic impact on the members of our industry.

S.1883 also would give states and localities the authority to restrict, and even ban, point of purchase display advertising of cigarettes in retail stores. The result of these actions

could be extremely disruptive. Wholesale distributors rely on promotional allowances to help them tout both tobacco and non-tobacco products. These allowances may be used for a variety of purposes, including sales promotions, newsletters and bonuses. Often they are tied to advertising support from manufacturers. With the loss of the advertising component, there may be a loss of promotional monies used by distributors.

Retailers also rely on advertising dollars and promotional allowances. Regulations to restrict or eliminate advertising would deprive them of significant revenue. Thus, it creates an adverse economic effect on both the wholesale-distributors and retailers, many of them small, that sell cigarettes and other tobacco products.

Sales of cigarettes are one of the major sources of revenue and profit for wholesale distributors and small food/tobacco retailers. Regulations to restrict, if not eliminate, point of purchase advertisements would destroy the primary method that retail businesses have to communicate the brands they sell.

The provisions of S. 1883 which would authorize the Federal government to prohibit distributors from shipping tobacco products to retailers, and which subject distributors' and retailers' inventories to seizure by the Secretary of Health and Human Services are also of particularly grave concern to us. The penalties and procedures contained in these provisions would unfairly penalize distributors of tobacco products and throw our business into total disarray.

S.1883 directs the Federal government to deny delivery of tobacco products to retailers found to have sold cigarettes to minors in violation of State law. In addition, distributors can be banned from shipping tobacco products to retailers who engage in a "pattern or practice" of sales to minors. In instances of delivery and shipping bans, retailers and distributors would not even be afforded a hearing to contest the State's "findings" before the ban was put into effect. There's no opportunity to challenge potentially erroneous information. Violation of that ban could lead to the seizure of a retailer or distributor's entire inventory. That would be devastating.

Only after these severe economic sanctions have been instituted is there an opportunity for recourse. Although there is a proposal for an "informal" hearing at some point, how fair is it for a retailer or distributor to have a hearing weeks or even months after a ban is in place?

Banning shipments would unfairly penalize distributors. They have nothing to do with retail sales practices. Why should they have to eat the cost of unsold products?

The bill also unfairly discriminates against wholesalers depending on where they are located. Company "X" operating in a "Model State" will be subject to different rules than Company "Y" which operates in an adjacent state. Moreover, companies with operations in both Model States and non-Model States would be forced to adhere to two completely different sets of rules. This would be costly and confusing.

The NCWA favors efforts to prevent young people from smoking. But close attention must be paid to the unintended consequences of the means employed to achieve that goal. As currently drafted, S.1883 imposes unreasonable and unfair burdens on distributors of legal products that could adversely affect the economic vitality of our industry.

The restrictions on advertising raise critical constitutional questions.

We are deeply concerned with the constitutional questions raised by this legislation. While we acknowledge the government's legitimate role to regulate commercial activities, like advertising, we have real concerns that the level of regulation could rise to the level of virtual prohibition of commercial free speech, a violation of the Constitution's Bill of Rights.

The legislation would repeal federal preemption thus, permitting potentially extensive proliferation of state and local rules and restrictions on advertising. Cigarettes and other tobacco products are nationally produced and distributed products which benefit from the support of the major producers. Therefore, the advertising and incentives for sales of the legal products to consumers legally entitled to purchase them could be significantly curtailed. Eliminating federal preemption could give license to outright censorship.

However, court decisions indicate that's unconstitutional.

In the 1980 case of Central Hudson Gas & Electric vs. Public Service Commission of New York, the Supreme Court established key tests which the government must meet before regulating truthful advertising. The restriction must directly advance a substantial government interest, and it must be the least restrictive regulation. Proposed limitations in some communities could impose severe restrictions. The combination of draconian restrictions in several communities could amount to total prohibition.

As an attachment to our statement, we have included an editorial from the September, 1989 issue of Candy Wholesaler. It effectively raises the question of what are the limits on advertising when the government starts down the path of restricting commercial free speech.

Creation of a new federal office is an unnecessary expense.

Numerous government offices and private organizations have been studying tobacco products and educating the public on their findings. Creation of a new federal office is an unwarranted duplication of effort. With the federal deficit continuing to soar, NCWA continues it's long held conviction that the primary goal should be reducing the deficit and balancing the budget.

Yet this bill proposes creating a new bureaucracy, the Center for Tobacco Products within the Center for Disease Control. The proposal to authorize $185 million adds to the federal deficit while adding little to efforts already being

conducted.

The addage from former Sen. Everett Dirksen seems appropriate. Adding a million here and a million there and pretty soon you're talking about real money. We're encouraged that even the Secretary of Health and Human Services, under whose authority this new office would fall, is opposed to its creation.

In conclusion, we urge the committee to defeat S.1883. The legislation will have an adverse impact on wholesale distributors. The advertising restriction pose critical questions of violating the constitution and the cost needlessly raises federal expenditures and deficits on an already over burdened federal budget. We do not believe that this Committee, the drafters or the sponsors of this bill are "out to get" wholesalers. But, that will be one of the unintended consequences of this legislation.

Thank you very much for providing us with this opportunity to express our views.

EDITORIAL

A Free Country's Increasingly Limited Freedoms

New York City: *No tobacco advertising on city-owned billboards.* Amherst, MA: *No tobacco advertising on city buses.* West Palm Beach, FL: *No tobacco or alcohol advertising in the city stadium and auditorium.* Denver, CO: *No tobacco or alcohol advertising in the transit system.* Hampton, VA: *No tobacco advertising on buses.* Los Angeles County, CA: *No tobacco or alcohol advertising on county beach facilities.*

The list of local-area prohibitions on the tobacco industry's right to promote products is growing fast, but that's just the tip of the iceberg. In Congress right now there are at least four separate bills attempting to prohibit or severely limit tobacco advertising. Their unquestioned goal is to kill the tobacco industry by preventing product information from reaching consumers.

The fact that advertising limitations have little or no effect on tobacco consumption doesn't seem to have sunk in with the self-appointed protectors of their self-determined vision of "The Public Good." But that's not the point, anyway.

The point is, once we start allowing our legislators to decide how much information the public should or should not get about legal products, where will they stop? What will the next consumer bugaboo be? What legal products will some legislators or consumer lobbyists decide are so "bad" for us that we shouldn't know about them and shouldn't have the right to make our own decisions about whether or not to purchase them?

Will it be suntan lotion, because too much sun is bad for us and some zealot decides the lotion industry inadvertently is promoting excessive exposure? Will it be those magnifying eyeglasses you buy in the drugstore, because people should have their eyes examined if they can't see properly? Might it be barbecue grills, because somebody somewhere said charcoal-grilled meat isn't healthy?

John Kawula of the Point-of-Purchase Advertising Institute (POPAI) put it succinctly recently. What's at stake here, he said, is the right of Americans to be Americans.

This is a country based on belief in the power of the public to make an intelligent decision as long as it has the information with which to make it. Freedom means having a choice, and having a choice means knowing the options.

To remove the public's access to information—in whatever form—is to limit the public's ability to choose. And that—as our new-found friends in Eastern Europe finally appear to have discovered—can destroy a nation from the inside out.

The well-intentioned proponents of the anti-tobacco advertising bills seem to have forgotten that basic concept. Perhaps the height on Capitol Hill or the headiness of local office is fogging their vision, because they also appear to be operating under the assumption that the American people are so stupid that they'll be turned into automatons by whatever they see on the nearest billboard.

They seem to have forgotten that advertising doesn't make people buy anything they don't want to buy. All advertising does is tell people about a product—what it is and why a manufacturer thinks we would want it.

It's pretty insulting to think that some of the people we've elected believe the American people can't differentiate between an advertising statement and what they really think or want. (That probably says more about how some of our legislators view themselves than anything else.)

Advertising is information, nothing more; and as long as a product is legal the American people have a right to have that information and respond to it as they see fit.

We agree with John Kawula. Let Americans be Americans. We understand the pros and cons of the products we purchase and the choices we make. Limiting tobacco advertising won't change tobacco consumption. It will only limit the public's right to decide. ■

What's at stake here, he said, is the right of Americans to be Americans.

Amusement & Music Operators Association
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STATEMENT SUBMITTED FOR THE RECORD BY THE AMUSEMENT AND MUSIC OPERATORS ASSOCIATION

The Amusement and Music Operators Association represents over 1500 small businessmen who operate coin-operated vending machines, amusement games, and jukeboxes. These vending machines include cigarette vending machines.

The Amusement and Music Operators Association does not support tobacco use by minors. We believe that sales of tobacco to minors should be prohibited, as they are at present in most states.

Section 919 of S. 1883, as presently drafted, provides incentive grants to states to limit youth access to tobacco products. These grants are to be available to states which prohibit the sale of tobacco products to minors; improve the enforcement of such an existing prohibition; and prohibit the sale of a tobacco product in a vending machine unless the presence of minors is not allowed on the premises where such machine is located.

The third of these prohibitions is apparently based on two assumptions: first, the belief that vending machines are a significant source of tobacco products used by minors; and second, that limiting vending machines to places where minors are not permitted is needed to enforce prohibitions against sales to minors. These assumptions are not borne out by available information.

Vending machines are not a primary, or even an important source of cigarettes to minors. A prohibition on vending machines would serve only to compel people who smoke -- whether minors or adults -- to get their cigarettes from other sources. Such a prohibition or limitation would hurt one small segment of business -- creating an artificial boost for their business competitors -- while achieving nothing in preventing smoking by minors.

Surveys by the National Automatic Merchandising Association have found that 80 percent of all cigarette vending machines are located in places not frequented by minors. Other surveys have shown that an even greater percentage of cigarette vending machines are located in places where minors are either not allowed or where the machines are supervised by adults responsible for the premises.

Most important, a Response Research study in 1989 of teen-age smokers show that only nine percent purchased cigarettes from vending machines. The obvious point is that 91 percent got their cigarettes from other sources.

Obviously, if a minor who smokes cannot obtain cigarettes from a vending machine, he will get them somewhere else. No information has ever shown that minors get cigarettes from vending machines because that is the only, or even the easiest place to get them.

Most cigarette vending machines are located in places where minors are not permitted or those where they are not usually present. The latter would include, for example, lounges of factories or other places where minors are not employed and would rarely, if ever, visit. Since minors are not necessarily forbidden entrance, S. 1883 might be read as urging states to remove cigarette vending machines from these places of employment.

Other cigarette vending machines are found in locations where they are properly supervised. Cigarettes are no more likely to be sold to minors, in these instances, from a cigarette vending machine than they are to be sold over the counter. A prohibition on cigarette vending machines in these locations would, therefore, discriminate against one means of a sale of a legal product. It would force most persons who buy cigarettes from vending machines to buy them, instead, from other outlets.

As operators of cigarette vending machines, we support the principle that these machines should be either in locations to which minors are not admitted or where they are supervised by adults. Vending machines should be permitted in places of employment or in any public facility where they are supervised by the responsible employee of the establishment.

Prohibitions against sales to minors should be equally and evenly enforced. But discriminatory measures against one means of selling cigarettes -- vending machines -- would be both ineffective and inequitable.

STATEMENT

OF

THE HONORABLE JOHN R. BLOCK

BEFORE THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON
THE IMPACT OF S.1883
ON THE FOOD DISTRIBUTION INDUSTRY

ON BEHALF OF THE
NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

Mr. Chairman and Members of the Committee, I am John R. Block, president of the National-American Wholesale Grocers' Association (NAWGA). I appreciate the opportunity to submit to the Committee the views of NAWGA on S.1883, the "Tobacco Product Education and Health Protection Act of 1990."

John R. Block
President
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NAWGA, including its foodservice division - International Foodservice Distributors Association (IFDA) - is a national trade association comprised of food distribution companies which primarily supply and service independent grocers and foodservice operations through the United States and Canada. NAWGA's 350 members operate over 1300 distribution centers nationwide with a combined annual sales volume in excess of $85 billion. NAWGA members employ more than 400,000 people nationwide; and, in combination with their independently-owned customer firms, they provide employment for several million people. IFDA represents member firms that sell annually over $22 billion in food and related products to restaurants, hospitals and other institutional foodservice operations.

The food distribution industry has serious concerns about the effect of S.1883 both on our members, wholesale food distributors, and their customers, retail food outlets. In our views, several provisions of the bill place severe and unnecessary burdens on wholesalers and retailers that will cause them substantial economic harm.

In particular, we are concerned about the provisions in S.1883 which would permit the Federal government to deny delivery of tobacco products or seize tobacco product inventories. These proposals represent an excessive use of the government's power to regulate commerce. While we believe that young people should not

smoke, and that laws should be obeyed, we strongly believe that the penalties set forth in S. 1883 would hurt many innocent businesses and are far too draconian for the infractions in question. Prohibiting distributors from shipping products unfairly penalizes the wholesaler for retail practices over which he has no control. In addition, the fact that these penalties can be imposed before a retailer has a chance to respond to the charges seems to be contrary to the principles of due process and fair play upon which our country's laws are based.

Equally problematic is the potential effect of the new authority afforded States and local governments under S.1883 to regulate advertising and promotion practices. We can easily see a situation where a State legislature, a town council and a county government all enact conflicting, burdensome laws regarding point-of-purchase displays and warnings. It is not hard to imagine a retailer finding itself in violation of a State law because it was trying to satisfy the requirements of a competing local ordinance. The net effect could be the de facto elimination of point-of-purchase advertising. This is serious; it could dramatically diminish cash flow from cigarette and tobacco product sales, an important source of revenue for retailers. Given the small profit margins typical in the grocery industry, reduced cigarette sales could adversely affect the economic viability of many food retailers which would have a direct impact on the financial well-being of many food wholesalers.

We appreciate the opportunity to share our views with the Committee on this important piece of legislation and we hope that you will carefully consider the potential impact of S.1883 on third parties involved in the distribution and sale of this legal product. Thank you.

Senator SIMON. Let me thank all of you for being here.
Our hearing stands adjourned.
[Whereupon, at 4:56 p.m., the committee was adjourned.]

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